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No. 108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 501, A. F. OF L., AND WILLIAM PATTERSON,
PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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v.

NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (R. 323) is reported at 181 F. (2d) 34. The findings of fact, conclusions of law and order of the Board issued April 12, 1949 (R. 295-300) are reported in 82 N.L.R.B. 1028. The Trial Examiner's intermediate report and recommended order, issued December, 31, 1948, are reported in 82 N.L.R.B. 1028, 1031 *et seq.*

JURISDICTION

The decree of the Court of Appeals was entered on April 6, 1950 (R. 336-337). The petition for a writ of certiorari was filed June 2, 1950 and was granted December 11, 1950.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). The original proceeding to review the order of the Board was filed by the petitioners in the Court of Appeals May 16, 1949 under the provisions of Section 10 (f) of the Act.

QUESTIONS PRESENTED

The following questions are presented:

1. Whether the picketing in this case affected commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

2. Whether the picketing in this case constituted secondary labor activity in violation of Section 8 (b)(4)(A) of the Act.

3. Whether the application of Section 8 (b)(4)(A) to the peaceful picketing in this case infringed on the free speech protection guaranteed by the First Amendment to the Constitution.

4. Whether the peaceful picketing in this case could be evidence of an unfair labor practice under the free speech provisions of Section 8 (c) of the Act.

5. Whether the blanket order granted enforcement by the court below could be issued on the findings of the Board in this case.

STATUTE INVOLVED

The pertinent provisions of the Labor-Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C., Supp. II, 141 *et seq.*) are set forth in Appendix B, *infra*, pages 108 to 115.

STATEMENT

Local Union No. 501 of the International Brotherhood of Electrical Workers, A. F. of L. has jurisdiction for trade union purposes in the electrical trade of the building and construction industry in the County of Westchester, State of New York, and in the Town of Greenwich, County of Fairfield, State of Connecticut. The local has its office in the City of Mount Vernon, County of Westchester, State of New York, within the Southern District of New York (R. 301-302).

Patterson is the agent or business representative of Local Union No. 501, residing in the City of White Plains, County of Westchester, State of New York (*ibid*).

On June 16, 1948, Samuel Langer, residing at Port Chester, Westchester County, New York, filed an amended charge with the National Labor Relations Board, wherein he charged that Local 501, and Patterson had been and are engaged in unfair labor practices within the meaning of Section 8(b) subsections (1)(A) and (4)(A) of the Act (R. 1-3).

On June 24, 1948 the Board, through its Regional Director for the Second Region, issued and served a complaint upon petitioners alleging that:

> "The acts of (petitioners) constitute unfair labor practices affecting commerce within the meaning of Section 8(b) subsections (1)(A) and (4)(A) and Section 2 subsections (6) and (7) of the Act" (R. 9).

In December, 1947, construction commenced on a one

family, private residence in the Town of Greenwich in the State of Connecticut (R. 40).

The Giorgi Construction Company had the general contract for this job, and sublet the carpentry work to Nicholas Deltorto and the electrical work to Samuel Langer, the charging party in this case (R. 39, 40, 41).

The gross amount of Langer's electrical subcontract was $325.00 (R. 53). The amount of the general contract was $15,200, covering the entire cost of the dwelling (R. 40).

All of the electrical work performed by Langer on this job was performed by non-union labor (R. 92).

The testimony taken at the hearings before the Trial Examiner established that Langer at one time operated under a union agreement with Local Union No. 501, but that he breached such agreement by employing non-union labor (R. 92, 93).

A day or two prior to April 16, 1948, Patterson visited the job and informed Deltorto and one of the carpenters that the electrical work was being done by non-union labor (R. 257). Deltorto stated that he did not know of the non-union condition because the electrical work had been performed during a period of a few days when the carpenters were not working on the job (R. 257, 161).

On April 16, Patterson returned to the job. He spoke to Deltorto who claimed ignorance of the non-union character of the electrical work. Patterson thereupon went to his auto, took out a placard reading "This job is unfair to organized labor; I.B.E.W. 501 A.F.L.", donned the placard and began to walk up and down in front of the job (R. 162).

Two carpenters who were then working on the job in behalf of the subcontracting carpenter, Deltorto, shortly after, ceased work and left the job (R. 161).

That evening Patterson telephoned Giorgi, the general contractor, and told him that the job was unfair; that Langer was non-union and that probably no other skilled trades would work on the job (R. 46, 47).

Langer had commenced and completed the "roughing in" electrical work on the dwelling but had some additional work to perform on his $325 contract. There is testimony showing that Langer finished about 60 per cent of the electrical work for which he had contracted and that approximately 40 per cent remained to be performed (R. 248; 53).

The carpenters working on the job were not ordered off the job by Patterson or any other person.

The picketing was entirely peaceful.

I

The Trial Examiner's Intermediate Report and Recommended Order

The Trial Examiner found that Samuel Langer was engaged in commerce within the meaning of Section 2, subsections (6) and (7) of the Act (R. 283). He conceded that the value of materials used and intended to be used by Langer on the house was not large (R. 248), but based the findings on the conclusion that "numerous strands in the web of commerce, several of which crossed state lines, were interlaced in the construction of the Greenwich house"

(R. 251). There was no direct evidence on the amount of materials used or allocated for use in the performance of the $325.00 electrical contract (R. 248 fn. 12). The Trial Examiner relied on the interstate status of the companies supplying Langer (R. 249-250), Langer's total annual business of $24,443.96 and the value of materials secured from points outside the State of New York by Langer in connection with his general business (R. 248). Similar reasoning was applied to the status of Giorgi and Deltorto (R. 246-247).

The Trial Examiner recommended the dismissal of the allegations in the complaint alleging violation of Section 8(b)(1)(A) of the Act together with the allegations in the complaint alleging that respondents threatened to induce and encourage employees of other employers to engage in violation of Section 8(b)(4)(A) of the Act (R. 260-265; 283).

He also recommended dismissal of the main allegation in the complaint alleging violation of Section 8(b)(4)(A) with respect to the Greenwich job on his finding of fact that Patterson's picketing on April 16, 1948 was an expression of views, argument or opinion and the dissemination thereof in written and visual form, containing no threat of reprisal or force or promise of benefit and that such picketing by virtue of the protection of Section 8(c) did not constitute an unfair labor practice (R. 281). The Trial Examiner stressed the fact that the picketing was not a joint enterprise and the evidence revealed no covenant between the electrical worker and the carpenter either directly or through the Westchester Building Trades Council requiring each to respect the other's picket line and concluded that the implicit threat and promise is of the same general nature which it can be

argued is embodied in every appeal for assistance by any person or group sharing a common interest with any other person or group (R. 280-281).

II

The Board's Decision and Order

The Board divided three to two on the question of whether jurisdiction should be asserted. Two of the members of the majority were of the view that the Board had "plenary power" to act in the case. The third member of the majority stated he would exercise jurisdiction because the specific controversy before the Board arose out of an interstate transaction. The two dissenting members of the Board stated that: "We believe the operations involved in this case constitute an essentially local enterprise with only the most remote effect upon commerce. Consequently, we do not desire to exercise our discretion to assert jurisdiction."

The majority of the Board ordered that the complaint be dismissed insofar as it alleged: "(1) that the respondents (petitioners herein) violated Section 8(b)(4)(A) by threatening to induce or encourage employees of employers other than Nicholas Deltorto or Giorgi Construction Company to strike or refuse to perform service in order to force said other employers to cease doing business with Samuel Langer and (2) that the respondents (petitioners herein) violated Section 8(b)(4)(A) of the Act.".

The majority of the Board ruled, however, that Section 8(c) does not immunize peaceful picketing under the circumstances of this case and held that petitioners had violated

Section 8(b)(4)(A) of the Act by picketing the Greenwich job on April 16, 1948.

III

The Decision in the Court Below

The Court of Appeals affirmed the order of the Board in an opinion issued February 24, 1950 by a divided vote of two to one and entered its decree on April 6, 1950. The Court stayed its order pending the filing of the petition for writ of certiorari by an order dated April 17, 1950, and by a further order dated May 15, 1950.

The Court ruled that the appeal must be decided on the merits because insignificant as Patterson's acts were, they were enough to satisfy the jurisdictional demands of the Act. The Court relied upon the fact that Langer had to go from New York to Connecticut in order to perform his part of the work, small though it was and that he had to bring materials from New York for use on the job. There was also reliance upon Langer's general business and the fact that Giorgi's headquarters were also in New York, that he had to bring materials from New York and that his general business extended into other states in substantial amounts.

The Court held that Patterson's purpose was to force Giorgi to "cease doing business with Langer" and that a distinction could not be made on the issue of the secondary boycott as between a third person engaged in a common venture with the employer and a third person dealing independently with the employer. In particular, the Court in-

terpreted the phrase "doing business" as ordinarily covering any business which the third party is free to discontinue regardless of whether he is merely supplying the material to the employer or has subcontracted with the employer to perform part of the work which the third party has himself contracted to do.

The Court conceded that "certain situations are, however, to be distinguished." Three types of cases were listed: (1) Where the work of the employer may be so enmeshed with that of the third party that it is impossible to picket one without picketing the other; (2) A strike which has for its purpose a dual pressure on the third person and the employer; (3) Where the third person is only a disguise for the employer.

The dissenting Judge was of the opinion that the picketing should be held permissible and enforcement of the order refused on the ground that it did not constitute a secondary boycott within the meaning of Section 8(b)(4)(A) of the Act. He relied upon the general legislative history with respect to the intent of Section 8(b)(4)(A), as illustrated by Senator Taft's statement concerning this section: "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and an employee" (93 Daily Congressional Record 4323; N.L.R.B., Legislative History, L.M.R.A., 1106).

He pointed out that the immediate cause of the labor dispute in the instant case was Giorgi's act of bringing on to the Greenwich job—which he controls—a non-union electrical subcontractor. It was his opinion that Giorgi's act of giving

Langer the contract is the very heart of the matter; and if the Union is barred from reaching Giorgi at all, its traditional weapons are blunted and perhaps destroyed. He considered that it is legitimate union activity within the scope of the Act for Patterson to set a picket line which would reach Giorgi within its direct orbit and Deltorto as enmeshed with Giorgi.

The dissenting Judge emphasized the inconsistency of the instant decision with the decisions of the National Labor Relations Board in *Ryan Construction Corporation*, 85 N.L.R.B. No. 76 and *Pure Oil Co.*, 84 N.L.R.B. No. 38. He also relied upon a decision of this court in *Carpenters and Joiners Union of America, Local No. 213* v. *Ritter's Cafe*, 315 U. S. 722, 728; *Douds* v. *Metropolitan Federation of Architects, Engineers, Chemists Local 231*, 75 F. Supp. 672 (S. D. N. Y.) as recognized by *N.L.R.B.* v. *Liquor and Distillery Workers Union*, 178 F. 2nd 584 (2nd Cir.), and *Mills* v. *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada*, 83 F. Supp. 240, 245 (W. D. Mo.).

The Court further held that Section 8(c) does not immunize the conduct which was the subject of the Board's action and stated its opinion that Section 8(c) applies, if at all, to cases where discursive argument accompanies language of inducement to act in violation of the statute. The Court also held that the inducement of individuals to withdraw from their employment was as much a violation not protected by Section 8(c) as inducement of a union to call a strike in violation of Section 8(b)(4)(A). The Court

further held that Section 8(b)(4)(A) and Section 8(c), as interpreted by it, did not violate the First Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

I

Legal determinations of effect on commerce are properly based on considerations of practical judgment rather than formulas or verbal chains of reasoning. *United States* v. *Yellow Cab Company*, 332 U. S. 218, 231; *10 East 40th Street Building, Inc.* v. *Callus*, 325 U. S. 578, 584.

The same administrative agency which asserted jurisdiction in the instant case on April 12, 1949, by a divided vote of three to two would refuse jurisdiction unanimously if the case were to arise today. Indeed, under the rules announced by the Board in October, 1950, a contractor engaged in the original construction of residences within the boundaries of a state would not become subject to the jurisdiction of the Board unless he received annually at least $500,000 of materials directly across state lines or $1,000,000 of materials indirectly across state lines (*infra*, pp. 26-27). The factor of doing business across state lines cannot be made the sole basis for the exercise of jurisdiction under the present rules of the Board, unless such business amounts to not less than $25,000 per annum (*ibid*). The development of actual experience by the Board with an industry which has not been the subject of its consideration under the Wagner Act is a proper index to the intent of Congress on the scope of the commerce clause of the Act. *Cf. U. S.* v. *American Trans-*

port Co., 327 U. S. 437, 454-455, 458-460; *Bunte Brothers* v. *Federal Trade Commission*, 312 U. S. 349, 351-353.

The facts and findings in this case bring it within the category of cases which are too remote in their effect on commerce to be subject to the Act. Giorgi's annual business of $60,000 and his purchases of goods from interstate suppliers are not relevant factors because the picketing was directed against Giorgi at the Greenwich, Connecticut, job site and not at his place of business or his general business. The same is true of Langer's annual business of less than $25,000. The Board did not find the picketing was directed against Langer's place of business or his general business. Upon analysis, it appears that the Board's majority opinion was limited to the facts on the particular job site. With respect to these facts, it is contended that the out-of-state residence of Langer and Giorgi did not transform original construction into commerce. *Murphey* v. *Reed*, 335 U. S. 868; *Barbe* v. *Cummins Construction Co.*, 49 F. Supp. 168 (D. C., Md.), affirmed 138 F. (2d) 667 (4th Cir.). Even if the flow of materials used or to be used were affected by the stoppage of a few days, the amounts involved bring the case within the *de minimis* rule. *Groneman* v. *I.B.E.W. Local No. 354*, 177 F. (2d) 995.

II

The interpretation of Section 8(b)(4)(A) in the case of an alleged secondary boycott, as in the instant case, raises two questions: first, whether the facts show any secondary labor activity, and second, if so, whether the secondary activity is allowable as an incidental effect of allowable direct

labor activity, such as strikes for the improvement of wages, hours and working conditions or for recognition.

The broad language of Section 8(b)(4)(A) prohibiting strikes and other labor activity "an object" of which is "forcing or requiring . . . any employer or other person . . . to cease doing business with any other person" must be read in the light of Senator Taft's statement in the course of debate on the bill that:

> "This provision (Section 8(b)(4)(A)) makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employee." (93 Daily Cong. Rec. 4323; N.L.R.B., Legislative History, L.M.R.A., 1106.)

The facts in this case do not fall within the above definition of a secondary boycott prohibited by Section 8(b)(4)(A). Local No. 501 of the I.B.E.W. was a party to a primary labor dispute with Giorgi because of his employment of non-union electricians on the job site. The economic realities of the building and construction industry make the relationship of a journeyman electrician to his particular employer on a specific job of insignificant importance in comparison with the journeyman's relationship to labor conditions in the area. Wages are determined on an area basis rather than by the collective bargaining relationship with a particular employer on a particular job. The shifting nature of employment in the building and construction industry is such that employees work on a particular job for a particular employer for only a short time and building trades employees shift constantly from job to job and from

employer to employer. Thus, Local No. 501 had a direct economic interest in the non-union condition on the job site in this case and their assertion of that interest against Giorgi was primary, not secondary, labor activity. Deltorto's employees in the carpentry trade also had such an interest because their rates of pay would be affected if non-union conditions forced down the area wage rates for electricians. Also, the carpenters' conditions of employment, other than wages, might deteriorate on this job and, indeed the carpenters might be replaced by non-union men.

Congress did not intend that Section 8(b)(4)(A) prohibit any labor activities directed against the business of an employer who is directly involved in the labor dispute. The direct picketing of Giorgi was, therefore, allowable because it did not constitute a secondary boycott prohibited by Section 8(b)(4)(A).

Local No. 501 of the I.B.E.W. also had a direct labor dispute with Langer. He had breached his agreement with the local union. It was, therefore, allowable to picket for the purpose of inducing his employees to quit and, thereby, induce Langer to return to his previous status under the agreement as an employer whose wage rates were determined by collective bargaining rather than by his bargaining with individual employees.

The absence of Langer's employees from the job at the time of the picketing does not vary this conclusion under the facts of the building and construction industry. Picketing the job assures public notice to the non-union employees whether they are on or off the job. The non-union employer learned of the picketing although he was not on the job at the time of the picketing. It is reasonable to as-

sume they would also hear of it. If picketing can be engaged in on a building job in a primary labor dispute only when the non-union employees are present, the work can be arranged for after nightfall, thus reducing the picketing to a nullity.

The effect of the picketing on Deltorto's employees was, thus, a collateral and allowable effect of the direct picketing of Langer. Similarly, the direct picketing of Giorgi would have, as an allowable and collateral effect, persuasion of Deltorto's employees to quit even if he were a truly secondary party.

III

The right of free speech protected by the First Amendment cannot be abridged constitutionally by a policy of Congress, if such it was, to preserve business relationships from disruption by labor unions when more than one employer is involved and the relationship between such employers is deemed separate under the common law.

If this were the congressional policy underlying Section 8(b)(4)(A), it would be as arbitrary as the line sought to be drawn by the Illinois courts limiting allowable labor disputes to an employer and his employees, which was struck down by this Court in *A.F.L.* v. *Swing*, 312 U. S. 321. See *Carpenters and Joiners Union of America, Local No. 213* v. *Ritter's Cafe*, 315 U. S. 722. The authority of these cases has not been diminished by recent decisions. *Teamsters* v. *Hanke*, 339 U. S. 470, 479-480.

IV

In any event, there was no evidence upon which the

Board's findings could be based under Section 8(c) of the Act which provides that:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

The trial examiner found the peaceful picketing in this case, as a matter of fact, satisfied the above requirements of Section 8(c) (R. 281). The Board did not disturb this finding (R. 296, 297) and the court below assumed that such was the action of the Board (R. 328). The conclusion that there was no proof of violation should, therefore, follow.

The Board has stated in the *Wadsworth* case, 81 N.L.R.B. 802, upon which it relied in the instant case, that there is a conflict between Section 8(c) and Section 8(b)(4)(A) and it believes it more consistent with congressional intent to permit Section 8(b)(4)(A) to prevail. The conflict does not appear to be between the two sections of the Act; it is more in the nature of a conflict between Section 8(c) and some statements of Congressmen made in the course of the legislation.

If the two sections of the Act can be read together reasonably without nullifying either, that would seem to be more consistent with the usual principles of statutory construction than the direct nullification of Section 8(c).

This reconciliation of the two sections can be accom-

plished by interpreting Section 8(b)(4)(A) as applicable to strikes for illegal secondary objects, indirect means of inducing or encouraging strikes utilized by unions having the power to call strikes and picketing by a union not empowered to call a strike when accompanied by violence, threats of violence or offers of monetary or other reward. If Section 8(c) were so interpreted, the picketing in this case would be unavailable as a basis for a finding in this case because it was entirely peaceful and the electricians union had no power over the carpenters union or its members.

ARGUMENT

I

The Picketing of the Dwelling House Construction Job In This Case Did Not Affect Commerce

A. The Determination of Whether Commerce Is Affected Must Be Based on Practical Judgment

This Court has made it clear that "interstate commerce is an intensely practical concept drawn from the normal and accepted course of business." *United States* v. *Yellow Cab Company*, 332 U. S. 218, 231. Congress has the power to control activities which have "such a *close and substantial* relation to interstate commerce that their control is *essential or appropriate* to protect that commerce from burdens and obstructions" (italics supplied). *N.L.R.B.* v. *Jones and Laughlin Steel Corporation*, 301 U. S. 1, 37.

The question of whether commerce is affected in a particular case cannot be determined under these standards by

application of verbal chains of reasoning. It is also clear that there are no pat formulas which automatically dispose of the issue:

> "The attempt to achieve a form of words that would avoid an exercise of judgment that a particular occupation is more in the nature of a local business than not, is merely to be content with formulas of illusory certainty . . . we cannot escape the duty of drawing lines." *10 East 40th Street Building, Inc.* v. *Callus*, 325 U. S. 578, 584.

It is of course true that activities which may be intrastate in character, when separately considered, are nevertheless sufficiently related to commerce to come within the scope of the commerce clause in Labor-Management Relations Act of 1947. The required close and substantial relationship to commerce must be proved, however, in each case for no finding has been made by the Congress that all unfair labor practices affect commerce. *N.L.R.B.* v. *Jones and Laughlin*, *supra*, at pp. 31, 32.

The establishment of a substantial rather than a verbal test of relationship to commerce proceeds not alone from the intrinsic need of giving the words "interstate commerce" and "affecting commerce" a real rather than an artificial meaning but also from the large scale consequences which determinations of "commerce" register upon the State-Federal system of government.

This Court expressed a caution on this latter point in its

earliest decision upholding the enactment of the National Labor Relations Act under the commerce power:

> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree." *N.L.R.B. v. Jones and Laughlin Steel Co., supra*, 37.

The caution was repeated in the more recent case of *Polish National Alliance* v. *N.L.R.B.*, 322 U. S. 643, 650:

> "The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single state, but that cannot justify absorption of legislative power by the United States over every activity."

B. The Picketing in the Circumstances of the Instant Case Did Not Affect Commerce Under Any Test of the Scope of Judicial Review of the Evidence

The facts in the instant case bring it within the categories of activities, which when separately considered, are of intra-

state character. On April 16, 1948, Patterson, the business representative of I.B.E.W. Local 501, walked carrying a picket sign in front of a partly completed small private dwelling house at Greenwich, Connecticut, which had been under construction approximately four months (R. 101, 40). Two carpenters, who were then at work on the house, left the job (R. 183). Work resumed in several days (R. 165). Langer, the non-union electrical contractor, was replaced by a union electrical contractor (R. 46, 77, 78).

It is conceded that the inquiry whether the picketing affected commerce cannot be limited to the above facts. It is respectfully submitted, however, that the necessary effect on commerce cannot be proved by the mere formulation of relationships of the picketing to aspects of commerce. The relationships must be examined on the facts and findings in this record to determine whether they are substantial.

1. General Status of Giorgi.

Among the factors relied on by the court below in deciding the picketing affected commerce was the conclusion that Giorgi, the general contractor on the job, had a business which extended into other states in substantial amount. The record showed that Giorgi's total annual business was $60,000 in 1947 and he testified that "a part" of this total represented work performed outside the State of New York where he had his headquarters (R. 38, 39).

The Court of Appeals for the District of Columbia has pointed out, however, that the picketing cases in the building trades present a jurisdictional situation which are dis-

similar from any of the cases heretofore decided by the Supreme Court. *Denver Building and Construction Trades Council et al* v. *N.L.R.B.* 18 Labor Cases 65,949; decided September 1, 1950. "In each, as illustrated by the *Fainblatt* case, the unfair labor practice occurred at a place of business where interstate commerce was engaged in though the effect of the forbidden practice was felt first on a local activity such as production or manufacturing (at pp. 78, 156). The impact of the picketing in the instant case is not at Giorgi's place of business but at the job site. Under the facts and the findings of this case, the effect of the picketing is necessarily limited, insofar as Giorgi is concerned, to his activities at the Greenwich, Connecticut, job and his other business, whatever its correct status under the commerce clause of the Act, is not involved in any way.

2. General Status of Langer.

The same is true of Langer's general business on the findings of the administrative agency in this case. The court below relied upon the conclusions that "his general business required him continuously to import substantial amounts of material from other states into New York, and he did a substantial amount of work in Connecticut in addition to the job in question, as well as work for large contractors whose own interstate activities were very large indeed." *I.B.E.W. Local 501* v. *N.L.R.B.*, 181 F. (2d) 34, 36-37.

The facts in the record showed that Langer's total volume of business from July 1, 1947, to July 1, 1948, was $24,443.96 (R. 57), that the value of material purchased by him during this year from concerns located outside the State of New

York was $5,095.66 (R. 61), that the value of work performed outside the State of New York for this period by Langer amounted to $8,402.52 (*ibid*), and that the value of work performed by him for industrial plants was $4,814.33 (R. 57). In this latter connection, Langer's work in 1947 appeared to consist of installation and repair work for a manufacturer of electrical fixtures (R. 141), a manufacturer of surgical instruments and appliances (R. 144-145) and a toy manufacturer (R. 151-152).

Whatever the status of Langer's general business on these facts may be under the commerce clause of the Act, there is no finding by the Board that the picketing of respondents was directed against such general business. *Cf. May Dept. Stores* v. *N.L.R.B.*, 326 U. S. 376, 392. Indeed, the Board unanimously dismissed the complaint, "insofar as it alleges that the Respondent violated Section 8(b)(4)(A) by threatening to induce or encourage employees of employers other than Nicholas Deltorto or Giorgi Construction Company to strike or refuse to perform services in order to force said other employers to cease doing business with Samuel Langer." (R. 298-299, 295). If there is a question as to whether the Board based its administrative finding on the facts of this picketing case or on the isolated instances of conversations Patterson had with others about Langer's non-union status, that question is resolved by an examination of the Board's decision.

Two members of the Board considered the dispute too remote in its effect on commerce to warrant the exercise of jurisdiction and two members were of the view that the Board has "plenary power to act in this case and they would

exercise jurisdiction for the reasons given in the *Watson* case" (R. 296, 299). The decisive vote was cast by the Chairman who stated "He would exercise jurisdiction here because the very controversy before the Board arose out of an interstate transaction, in which New York contractors were engaged in the construction of a residence in the State of Connecticut." (R. 296.)

The question of the effect of the picketing, therefore, turns on the events and circumstances at the site of the construction job.

3. The Job Site.

The factor of the so-called "interstate transaction" relied on by the Chairman of the Board appears on analysis to be limited to the fact that Giorgi and Langer each traveled from their respective headquarters in Port Chester, New York to Greenwich, Connecticut, to supervise their employees. The court below gave weight to this factor (R. 325-326). This Court has ruled, however, that original construction is not commerce. *Murphey* v. *Reed*, 335 U. S. 865. The out-of-state residence of contractors or employees on the job cannot transform original construction into commerce. If this proposition were valid, the Fair Labor Standards Act would apply to every employee in the construction industry who crosses a state line to reach his place of work. It has, however, been held otherwise. *Barbe* v. *Cummins Construction Co.*, 49 F. Supp. 168 (D. C., Md.), affirmed 138 F. (2d) 667 (4th Cir.)

The court below also relied upon the factor of inflow of

materials to the particular construction job. It pointed out that Langer had to bring the materials which he used upon the job from New York and that Giorgi likewise brought the materials which he used upon the job from New York (R. 325, 326).

The record shows that the construction of the house had been under way for approximately four months at the time of the picketing (R. 40, 180). There is no direct evidence in the record as to whether Langer's future work required any materials or that such materials had not already been delivered to the job. There is an equal lack of evidence on this point as to the masonry materials used by Giorgi or as to any other materials, including lumber.

There was, therefore, no evidence to support a finding that the picketing in this case did affect the flow of materials to this job.

Even assuming that such materials were in the process of delivery, there is a question as to whether the *de minimis* rule should not be applied to the case because of the small amounts involved. There is no direct evidence in the record as to the value of all the materials which Langer was to make available for the job. The trial examiner assumed that the proportion of materials to the total cost of electrical work was one-third of the contract price (R. 248, fn. 12). The total value of Langer's contract was $325.00 (R. 53). Accordingly, if estimating is a proper method of proof, the cost of materials used or to be used by Langer would have been approximately $110.00. Masonry supplies were required in the amount of approximately $1,800.00 (R. 54).

There was no evidence on the cost of lumber and whatever lumber was used on the job was secured from a lumber yard located in Connecticut (R. 126, 129).

This Court has stated that the *de minimis* doctrine is applicable to the question of jurisdiction arising under the National Labor Relations Act. *National Labor Relations Board* v. *Fainblatt*, 306, U. S. 601, 607. See *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178, 181.

The Court of Appeals for the Tenth Circuit applied the *de minimis* doctrine to exclude a picketing case from the scope of the Labor-Management Relations Act of 1947. *Groneman* v. *I.B.E.W. Local 354*, 177 Fed. (2d) 995. There, the building involved was an elementary school of much larger size than the private dwelling house in this job. The Court assumed that there was an interruption in the direct inflow of materials to the job in the amount of $6,000.00. The Court held, however, that "the impact of this labor dispute upon commerce, in any event, is so trifling and microscopic as to bring it within the above pronouncement by the Supreme Court [in the *Fainblatt* case] and requires the application of the *de minimis* doctrine." (*Ibid* at pp. 997-998).

There is no basis for distinguishing the *Groneman* case on the assumption that there the dispute involved only one incident. The facts and surrounding circumstances of the picketing occasioned by the non-union condition were the same as in the instant case and, as has been pointed out above, the evaluation of the different positions of the Board members in the instant case shows that the decision to hold the dispute covered by the Act was based on the so-called "interstate" aspects of this particular dispute.

The consequences of a ruling that the *de minimis* doctrine has no application to a situation similar to that involved in the present case are apparent. The scope of federal power would be extended to a point which would eliminate whatever limited powers the states may be said to have at the present time. This result would not seem to be consistent with the position taken by this Court, expressed as dictum, it is true, that there must be some area of exclusive power in the states to preserve the fundamentals of our dual system of government.

The fact is, moreover, that under the present rulings of the Board it would not take jurisdiction of the instant case if the case were to arise today. On October 6, 1950, the National Labor Relations Board issued a general statement on the scope of its jurisdiction based upon eight decided cases. The Board's statement reads as follows:

> "The plan that emerged from the eight decisions made it clear that whenever federal jurisdiction exists under the statute and the interstate commerce clause of the Constitution, the Board will exercise jurisdiction over:
>
> "1. Instrumentalities and channels of interstate and foreign commerce (for example, radio systems).
>
> "2. Public utility and transit systems.
>
> "3. Establishments which operate as integral parts of a multi-state enterprise (for example, chain stores, and branch divisions of national or interstate organizations).

"4. Enterprises which produce or handle goods destined for out-of-state shipment, or performing services outside a state, if the goods or services are valued at $25,000 a year.

"5. Enterprises which furnish services or materials necessary to the operation of enterprises falling into categories 1, 2 and 4 above, provided such goods or services are valued at $50,000 a year.

"6. Any other enterprise which has:

(a) a direct inflow of material valued at $50,000 a year; or

(b) an indirect inflow of material valued at $1,000,000 a year; or

(c) a combination inflow or outflow of goods which add up to at least a total of '100 per cent' of the amounts required in items 4, 5, 6(a) and (b) above.

"7. Establishments substantially affecting national defense." *Release of National Labor Relations Board*, dated Friday, October 6, 1950, titled: *"N.L.R.B. Clarifies & Defines Areas in which it will and will not exercise jurisdiction."*

The scope of present rulings of the Board have limited the effect of the factor of inflow of materials. Thus the Board will not assert jurisdiction over a contractor in the building trades who is engaged solely in original construction within the boundaries of a state unless he received materials valued in the amount of $1,000,000 a year from outside the state

by indirect inflow or unless he received a direct inflow of material valued at $500,000 a year. Even the contractor who performs services across state lines would be excluded unless such services are valued at $25,000 a year. This latter rule would exclude Langer since his annual out-of-state business was less than $8,500 (R. 61) and he would certainly not come within the amounts prescribed with respect to direct or indirect inflow of out-of-state material or the other standards now applied by the Board.

As pointed out above, Giorgi's general status is irrelevant because the picketing could not on this record affect his general business in any way. Moreover, there is no evidence as to the amount of out-of-state business performed by Giorgi (R. 38, 39).

It may be contended by the Board that the present rulings of the Board do not have any bearing on the instant case because they represent an exercise of administrative discretion rather than decisions of law. It is respectfully submitted that this contention overlooks the basis upon which rulings of law on the scope of commerce are made. The pronouncements of this Court show conclusively that the rulings of law on commerce are based upon practical judgment—not legal formulas. It is difficult to distinguish the type of differences in practical judgment which are available to draw a line between rulings of law and administrative judgments that commerce is affected in too remote a sense to warrant the exercise of jurisdiction.

The record of Board actions on this subject shows a development of experience in an industry which had not here-

tofore been a subject of jurisdiction by the Board. In the *Watson* case the majority of the Board stressed the fact that its ruling of coverage was the basis of practical considerations. 80 N.L.R.B. 533, 534 to 536, November 22, 1948. In the *Mentzer* case, decided March 24, 1949, the Board declined to assert jurisdiction as to a complaint alleging violation of the union security provisions of the Labor-Management Relations Act of 1947 although the plastering contractor there involved had an annual business of $33,000 and was working on an apartment house valued at more than $175,000. (82 N.L.R.B. 389.) One of the three members of the Board who made up the necessary majority stated that he was still of the view that the Board had no choice but to proceed with such cases if the complaint alleged a violation of Section 8(b)(4)(A) of the Act. (*Ibid* at p. 392.) This latter position was dropped in the ruling of the Board in the instant case (April 12, 1949) where the member stated that in the future he would be governed by the view that the Board is free to exercise its jurisdiction or not to take jurisdiction in all cases and that Section 8(b)(4)(A) violations were no exception to that rule (R. 296). On July 19, 1949, the Board, by unanimous decision, declined to assert jurisdiction in the case of *Petredis and Fryer* where a non-union condition had occasioned the picketing of an $80,000 drive-in theatre at Bridgeville, Pa. (85 N.L.R.B. 241, 242, fn. 6).

The rulings of October 6, 1950, *supra*, which have been issued by the Board on the scope of its jurisdiction have been more recently amplified in the matter of *Hotel Association of St. Louis*, (92 N.L.R.B. No. 215, January 19, 1951) wherein the Board declined to assert jurisdiction in a rep-

resentation proceeding involving an association of twenty-two hotels located in St. Louis.

The course of the decisions of the National Labor Relations Board which have been related above demonstrates that the Board has found its initial position of "plenary authority" in the field of commerce to be impractical under the provisions of this statute and the facts of the industries subject to its regulation. We submit that there is nothing to bar this Court from taking actual history into account in determining the intent of the Congress as to the scope of the commerce clause. (See *U. S.* v. *American Transport Co.*, 327 U. S. 437, 454-455, 458-460 and *Bunte Brothers* v. *Federal Trade Commission*, 312 U. S. 349, 351-353). See also Twelfth Intermediate Report of the Committee on Expenditures in the Executive Department, 80th Congress, 2nd Session, House Report No. 2050, May 26, 1948, in which a congressional committee, relying upon a unanimous report of the joint subcommittees of the House Committee on Expenditures in the Executive Department and the House Committee on Education and Labor, took vigorous exception to the broad interpretations of the General Counsel of the Board and the Board on the scope of the commerce clause in the Act and concluded that such interpretations were not consistent with the original intent of the Congress.

We do not contend that the practical judgments of the National Labor Relations Board cannot be the subject of difference of opinion, nor do we contend that the language of the Act precludes the Board from an administrative exercise of discretion to decline to assert jurisdiction. We submit, however, that the facts of the instant case are so

limited and so well within the scope of the present rulings of the Board excluding small cases from the application of its jurisdiction, that a practical judgment in this case requires the conclusion that the Congress did not intend to cover labor disputes of the local character here involved under the commerce clause of the Act.

The contrary view produces an anomalous result. Section 303(a) of the Act gives private parties the right to sue for damages in the Federal District Courts for the same acts which are the subject of administrative action by the National Labor Relations Board under Section 8(b)(4)(A). Accordingly, cases which are not deemed sufficiently close in their relationship to commerce to warrant the administrative action of the specialized agency established by the Congress can nevertheless be brought to the Federal judicial system for decision.

II

Section 8(b)(4)(A) of the Act Prohibits Secondary Labor Activity and Does Not Apply to the Picketing in This Case Which Constituted Primary Labor Activity

A. Section 8(b)(4)(A) Does Not Prohibit Primary Labor Activity

A careful examination of the decisions of the four Courts of Appeals which are before this Court shows that each of the Courts proceeded upon the assumption that Section 8(b)(4)(A) does not prohibit primary labor action. The Court of Appeals for the District of Columbia stated ex-

plicitly that "the provisions of Section 8(b)(4)(A) here involved are directed against secondary boycotts and secondary strikes. The words 'cease doing business with any other person' must be read with this in mind and interpreted in their setting. Not every strike which might be construed to have as an object the forcing of someone to 'cease doing business' with someone else is prohibited." *Denver Building and Construction Trades Council et al* v. *N.L.R.B. supra,* at p. 78,160. The Court of Appeals for the Second Circuit stated the question in the case in terms of "secondary boycott" and defined that phrase as follows: "The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands." *I.B.E.W. Local No. 501 et al* v. *N.L.R.B., supra,* p. 37. The Court of Appeals for the Fifth Circuit made general statements concerning the applicability of the statute "without resort to any distinction between primary and secondary activities" but when it analyzed the facts in relation to the statute it concluded that "these activities became *secondary* when the strikers attempted to induce and encourage the employees of this *neutral employer* Sales House." (italics supplied). *International Rice Milling Company, Inc.* v. *N.L.R.B.*, 183 F. (2d) 21, 26. It should also be noted that the Court of Appeals for the Fifth Circuit defined the prohibited offense in the same words used by the Court of Appeals for the Second Circuit in defining the term "secondary boycott" in the previously decided case

of *I.B.E.W. Local No. 501, et al* v. *N.L.R.B.* (*ibid*) The Court of Appeals for the Sixth Circuit, in its consideration of the questions of commerce and the constitutional issues raised by the First, Fifth, Thirteenth and Fifteenth Amendments referred to Section 8(b)(4)(A) of the Act as prohibiting secondary boycotts. *N.L.R.B.* v. *Local No. 74, United Brotherhood of Carpenters, et al.*, 181 F. (2d) 126, 132.

The language of the Act and its legislative history support these judicial views. Section 13 provides that "Nothing in this Act, except as specifically provided for herein, shall be construed as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

The legislative history of the Act supports the obvious conclusion that stringent as the Labor-Management Relations Act of 1947 was intended to be in its limitation of the rights of labor, the Congress nevertheless did not intend to take away from labor the right to engage in direct strikes for economic or recognition purpo es. Senator Taft drew a line of distinction between strikes "for justifiable purposes" and strikes for "wholly illegal and improper purposes." Indeed, he made it clear that "secondary boycotts" are to be distinguished from "strikes for higher wages, and hours and better working conditions, which are entirely proper and which through this bill are recognized as completely proper strikes." (93 Cong. Rec. 3834). He also stated that:

> 'Basically, I believe that the Committee feels, almost unanimously that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposi-

tion. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours and working conditions, when a contract has expired and neither side is bound by a contract....

"So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. *We have done nothing to outlaw strikes for basic wages, hours and working conditions* after proper opportunity for mediation." (93 Cong. Rec. 3835) (italics supplied). (See Section 8(d) of the Act.)

If this language is to be given any effect, then it is clear that Section 8(b)(4)(A) cannot be interpreted as applying to the collateral effects resulting from picketing in a primary labor dispute. In almost every case of picketing in a primary labor dispute, employees of employers other than the employer involved in the dispute may be dissuaded from entering the property which is the *situs* of the dispute and this, in turn, may be construed literally as intended by the picketers for the purpose of forcing the employer who is not involved in the primary labor dispute to cease doing business with the employer so involved. A literal reading of Section 8(b)(4)(A) would therefore result, as a practical matter, in the prohibition of most direct strikes for the improvement of wages, hours and working conditions.

The Congress has made it clear that this was not its purpose in enacting Section 8(b)(4)(A). The Congress also made it clear that it was lawful to engage in primary strikes or primary picketing for recognition purposes. In these

cases the picketing union may or may not be the duly qualified bargaining representative of the majority of the employees working for the employer. (See House Conference Report No. 510, 80th Congress, 1st Session, p. 42. Senate Report No. 105, 80th Congress, 1st Session, p. 22.)

Senator Taft stated with respect to the proper application of Section 8(b)(4)(A) that:

> "It will not be directed against the use of propaganda or the use of persuasion, or against the use of any of the other peaceful methods of organizing employes. . . . It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing or employing persuasion." (93 Cong. Rec. 4436)

This clear statement of congressional intent has been confused at times by quotation of Senator Taft's statement refusing to recognize any distinction between good and bad secondary boycotts. In a colloquy with Senator Pepper on April 29, 1947 Senator Taft said:

> "It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different cases of secondary boycotts. So we have broadened the provisions dealing with secondary boycotts as to make them an unfair labor practice." (93 Cong. Rec. 4198; N.L.R.B., Legislative History, L.M.R.A., 1106.)

We contend that this did not mean that Section 8(b)(4)(A) was intended to apply to collateral effects of a primary strike or primary picketing. It is respectfully submitted

that this statement was intended only to explain the action of the Congress in refusing to recognize a distinction between secondary boycotts on the basis of justifiability in terms of the validity of the labor grievance at the point of the primary labor dispute. The opponents of the bill suggested most frequently that secondary boycotts were justifiable and should be allowed if the boycotted goods emanating from the place of primary dispute were produced under sweatshop conditions.

The legislative history of the Act shows that even the opponents of the Taft-Hartley Bill were agreed that certain types of secondary boycotts were unjustifiable. (See the State of the Union message to Congress January 6, 1947, 93 Cong. Rec. 136 and the President's veto message, 93 Daily Cong. Rec. 7501; N.L.R.B., Legislative History, L.M.R.A., 916. See also the President's veto message on the Case Bill, I Hearings before the Committee on Education and Labor, 80th Congress, 1st Session, on H. R. 4908, H. R. 8, H. R. 725, H. R. 880, H. R. 1095 and H. R. 1096, pp. 11 and 20.)

The attention of the Congress was focused on product boycotts when it enacted Section 8(b)(4)(A). See for example, 93 Daily Cong. Rec. A 1296; N.L.R.B., Legislative History, L.M.R.A., 582. Prominent among the cases which even the opponents of the Taft-Hartley Bill considered unjustifiable use of the secondary boycott were the cases where the picketing or striking union was seeking to effect a change in union affiliation at the place of manufacture through its economic power at the place where the products were to be used (93 Daily Cong. Rec. 4323; N.L.R.B., Legislative History, L.M.R.A., 1106.) They contended, how-

ever, that there were cases where the so-called "secondary boycott" was proper if the materials which were boycotted at the place of use were produced in plants where substandard conditions of labor were maintained.

It is clear that Senator Taft and the proponents of the Bill refused to recognize any such distinction and were of the opinion that there was no practical way of distinguishing between secondary boycotts on the basis of whether they were "good" or "bad." (*Ibid.*) It was in this context that Senator Taft made the above quoted statement concerning the all inclusive application of Section 8(b)(4)(A) to all secondary boycotts. At the conclusion of his colloquy with Senator Pepper, Senator Taft said:

> "Likewise, under the principle announced by the Senator from Florida, the workers could say that the C.I.O. union is not securing a high enough wage for the workers and is not representing the workers in the way it should represent them and that therefore they will strike. For instance, all over the United States carpenters are refusing to handle lumber which is finished in a mill in which C.I.O. workers are employed, or in another case, in which American Federation of Labor workers are employed."
>
> • • • • •
>
> "I do not see how we can distinguish between a plant employing union labor and a plant employing non-union labor, or between a plant paying good wages and a plant paying poor wages, or a plant employing C.I.O. labor and a plant employing A.F.L. labor. The members of the committee do not see any way to distinguish between those cases and prevent the gradual forcing

of an A.F.L. or C.I.O. control in various unions, and putting workers out of employment." (*Ibid.*)

It is for the reason that the broad scope of Section 8(b)(4)(A) did not allow labor to employ the secondary boycott against "sweatshop" goods that the President objected to that part of the Bill. (93 Daily Cong. Rec. 7501; N.L.R.B., Legislative History, L.M.R.A., 916.)

It is respectfully submitted that this controversy over the question of whether Section 8(b)(4)(A) could be drafted to prohibit unjustifiable secondary boycotts and yet allow secondary boycotts which were for a good purpose, did not in any way change the position of the proponents of the Bill or the language of the Act permitting direct organizational strikes or picketing, even though such strikes or picketing might have collateral consequences. We further contend that the refusal of the Congress to distinguish between secondary boycotts which had "good" and "bad" purposes did not mean that any secondary aspect of striking or picketing would make such striking or picketing a secondary boycott prohibited by Section 8(b)(4)(A), even though it were truly a direct form of labor activity.

B. The Picketing in This Case Constituted Primary Labor Activity Which Is Not Prohibited by Section 8(b)(4)(A).

1. Definition of Secondary Labor Activity Prohibited by Section 8(b)(4)(A).

The entire issue on this portion of the case turns on the proper description of the secondary labor activities which the Congress intended to prohibit by Section 8(b)(4)(A).

Senator Taft stated succinctly the Congressional purpose as follows:

> "This provision (Section 8(b)(4)(A) makes it unlawful to resort to a secondary boycott to injure the business of the third person who is wholly unconcerned in the disagreement between an employer and his employees." (93 Daily Cong. Rec. 4323; N.L.R.B., Legislative History, L.M.R.A., 1106.)

The court below has made its definition in the following language:

> "The gravamen of a secondary boycott is that its sanctions bear not upon the employer who alone is a party to the dispute but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer with the hope to induce the employer to give in to his employees' demands." (R. 327).

We believe that the definition of the court below is sound but that its application of the definition overlooks economic realities in the building and construction trades as stated by the dissenting judge below. A proper application of this definition will show that there was no violation of Section 8(b)(4)(A) in this case.

Before proceeding to the application of this definition to the facts in this case it would be well to analyze the definition in the light of the legislative history of the Act.

The actual cases described in the debates and the reports included the following:

1. An employer in the business of raising and marketing turkeys refused to hire union turkey pickers. The turkeys

were later refused shipment. (93 Daily Cong. Rec. A 1295; N.L.R.B., Legislative History, L.M.R.A., 582.)

2. The barring of "hot goods" from the market in cases involving shipments of lettuce, milk and asparagus. (*Ibid.*)

3. Electricians in the City of New York refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than the local union representing the New York electricians. (Senate Report No. 105, 80th Congress, 1st Session, p. 22; See *New York Times*, June 26, 1950; *New York Herald Tribune*, June 29, 1950.)

4. The plant of a manufacturer of neon signs in Hartford, Connecticut, was organized by the C.I.O.. The A.F.L. sign hangers union refused to hang these signs before any store. (93 Daily Cong. Rec. 3954; N.L.R.B., Legislative History, L.M.R.A., 1012.)

5. C.I.O. longshoremen refused to unload lumber carried in ships manned by A.F.L. seamen. (93 Daily Cong. Rec. 4255; N.L.R.B., Legislative History, L.M.R.A., 1056.)

6. Refusal of teamsters to handle lumber because it is made in a plant where a C.I.O. union is certified. (93 Daily Cong. Rec. 4323; N.L.R.B., Legislative History, L.M.R.A., 1106.)

The statements in the reports and debates indicate that Congress had the following typical situation in mind when it enacted Section 8(b)(4)(A). A union is engaged in a primary labor dispute with employer A, a manufacturing company. There are substantive issues in this dispute. These issues may be the usual requests of a union for an improve-

ment in the terms of the labor agreement covering wages, hours or conditions. The substantive issue may also involve the request of a union which has not secured recognition from employer A for such recognition. In a declining economic situation the issue may be raised by the employer who wishes to effect a reduction in the wages or other terms of employment provided in a labor agreement.

As has been pointed out above (pp. 31-38) the union may exercise its collective strength in the dispute by way of strike or by peaceful picketing and other means of persuasion. The Congress did not intend to limit the rights or power of labor in the primary labor dispute against employer A except insofar as the national emergency disputes sections of the Act are involved, (Sec. 206-210 and such other sections of the Act as 8(b)(4)(c).

When the Congress enacted Section 8(b)(4)(A) it was concerned with the extension of the primary labor dispute with employer A to another employer, who for the purpose of this discussion will be referred to as employer B, whose only connection with the dispute is based on the fact that he buys goods manufactured by employer A. It was the Congressional view that the substantive issues of the primary labor dispute, whether they concern wages or recognition, do not concern employer B. He is not responsible for either the refusal to grant the wage increase or the refusal to grant recognition to the union. Employer B has no power to make a direct settlement of the substantive labor issues which exist between employer A and the union. The only way in which employer B can affect the economic competition which is going on between employer A and the union is by withdrawing his business from employer A,

which will tend to weaken A's bargaining power in his dispute with the union. The union seeks to win its primary labor dispute with employer A by adding the economic factor of employer B's withdrawal of business from employer A to the union side of the scale.

It was also the Congressional view that the employees of employer B do not have any economic relationship to the substantive issues in the primary labor dispute between employer A and the union. The employees of employer B may be sympathetically interested in the welfare of the employees of employer A or they may be interested from an organizational point of view, because their union represents the employees of employer A or seeks to represent them. The employees of employer B do not have any direct economic stake in the final outcome of the labor dispute between the union and employer A, according to the proponents of the bill.

It was apparently the congressional view that employer B is the "third party" to the primary labor dispute and should not be drawn into such dispute, both because an "innocent" party would thereby be injured and also because it was of the view that a limitation of the scope of industrial warfare was necessary to prevent an indefinite extension of the dispute through the various reaches of the economy.

It should be noted that the term "innocent" cannot be given a meaning here as simply the absence of wrong doing. Employer A, involved in the primary dispute may also be entirely sound in his position on the substantive issues of the dispute as a matter of justice. The term "innocent" party must therefore mean a party who is a bystander and

who does not belong in the area of the dispute. The term "neutral" again does not mean that employer B may not desire either employer A or the union to win the dispute or that his continuation of business or withdrawal of business will not affect the dispute. His neutrality again derives from the fact that he is not within the direct area of the labor dispute.

It is respectfully submitted that the above analysis of the congressional intent is supported by the following statements made by Senator Taft concerning secondary labor activity:

> "They are strikes which are not direct strikes to settle questions of wages or hour or better working conditions. They are strikes which are, in effect, attempts to bring direct pressure on third parties to get third parties to work in some way to bring about a result which may ultimately be favorable to the one initiating the pressure, which has no direct relation to the work except perhaps with regard to the question of power. (93 Cong. Rec. 3838.)
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> "Take a case in which the employer is getting along perfectly with his employees. They agree on wages. Wages and working conditions are satisfactory to both sides. Someone else says to those employees, 'We want you to strike against your employer because he happens to be handling some product which we do not like. We do not think it is made under proper conditions.' Of course if that sort of thing is encouraged there will be hundreds and thousands of strikes in the United States.

There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike. The Senator (Pepper) says they must be encouraged to strike because their employer happens to have been doing business with someone the union does not like or with whom it is having trouble or having a strike. On that basis there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes, if we choose to call them that." (93 Cong. Rec. 4198.)

It is important to note that although the debates on the floor and the reports of the committee were lengthy and detailed, no mention was made by the senators or congressmen in charge of the Bill of the type of situation here involved as a case which was being prohibited by Section 8(b)(4)(A). It is true that members of the minority opposing the enactment of the legislation construed Section 8(b)(4)(A) of the Act as applying to a "refusal of union workers to work next to non-union workers of another employer engaged in a common project." (Senate Minority Report No. 105, Part 2, p. 20.) It is submitted that the statements of the minority are not usually a sound basis for ascertaining the will of the majority. Furthermore, the actual legislative history of this Act shows that the minority was endeavoring to get before the country descriptions of the results of a very complicated piece of legislation. It is therefore reasonable to assume that in the effort to develop such concrete examples, the minority may have interpreted the majority's bill in a more

extended fashion than the majority intended. See for example the discussion on political expenditures with special relationship to possible restrictions accomplished by that section upon the right of labor unions to make political comment in their newspapers. (93 Cong. Rec. 6436, 6441; N.L.R.B., Legislative History, L.M.R.A., 1526, 1534 and *United States* v. *C.I.O.*, 335 U. S. 106.)

2. The Union Was Engaged in a Primary Labor Dispute With Giorgi.

The court below concluded that there was no difference between Giorgi's relationship to Langer and the relationship between Giorgi and a supplier of materials (R. 327). It is respectfully submitted that the court below did not take into account the economic facts of the building and construction industry in reaching its conclusion.

Pertinent excerpts from a bulletin of the United States Bureau of Labor Statistics concerning the building trades have been collected and set forth in Appendix A to this brief (*infra* pp. 82-107). These excerpts show that building workers tend to regard themselves as members of given trades rather than as employees of given contractors. This derives from the fact that the work of the building and construction industry is temporary. Men are hired and laid off for the short period during which a particular building is under construction. Even within the noncontinuous duration of the particular construction job, employees in the particular trades may come on and go off the job at various times during the course of construction as the progress of the work calls for their particular trade. Understandably, they do not stay idle but move from one job to another,

either for the particular contractor who is employing them or for another contractor who may have a greater demand for men at that particular time. Their permanent asset is competence in the trade and their welfare is dependent upon conditions of the industry in the area rather than the status of the particular employer. Typically, wage rates for the particular trade are established on an area and not upon an individual employer basis. (Appendix A, *infra*, pp. 83, 84, 92-99.) See Dunlop and Hill, *The Wage Adjustment Board*, pp. 3, 85-88, 159.)

With these principal facts in mind it will be seen that I.B.E.W. Local 501 had a direct labor dispute with Giorgi. The substantive issue between Local No. 501 and Giorgi was the employment of non-union electricians. Giorgi, unlike the neutral and third party employer B discussed above, performed the very act which was the cause of the labor dispute. He decided to use non-union electricians on this particular construction job. The direct interest of Local No. 501 in the non-union condition on the job was not diminished by the fact that Giorgi, instead of hiring non-union electricians directly, hired them through Langer the non-union electrical subcontractor. Local No. 501 in this regard is in the same position as a union seeking to establish its status as the representative of the employees in a factory. Giorgi cannot therefore be considered an employer who is wholly unconcerned with the primary labor dispute. He is the party involved in the primary labor dispute.

Furthermore, Giorgi's employees and the employees of Deltorto, the carpentry subcontractor, had a direct economic interest in the dispute. It is a well known fact that the wage rates for the various trades in the building and construction industry have a traditional relationship to each

other. A cut in the electricians' wage rate in the geographical area of Greenwich, Connecticut, would ultimately have its effects upon the wage rates of other trades, including the wages of the carpenters. The non-union condition on the particular job was therefore not a matter of sympathy or organizational interest insofar as the union carpenters on the job were concerned. It was a matter of direct economic interest to them in terms of their wages. It was also of direct interest to the carpenters because their conditions of employment, other than wages, might deteriorate and, indeed, the continued use of non-union electricians might result in the whole job going non-union.

Under this analysis of the facts in this industry, it does not appear that application of Section 8(b)(4)(A) would accomplish the congressional intent which allowed direct organizational strikes or picketing. It will be noted that the picket sign referred to the fact that "the job" is unfair to organized labor. This is in truth the actual situation, since the non-union condition on the job, ordinarily attended by a lower wage scale, was unfair, and would be productive of adverse economic consequences not only to the electricians who were trying to preserve their wage rate in the area but also to the affiliated trades of the building and construction trades council whose area wage rates would be affected by a reduction in the area wage scale for electricians.

It was on this point of economic reality that the dissenting judge below differed from the majority. He pointed out that the error in the majority opinion was to assume a fact which was not in accord with the economics of the industry. He pointed out that the majority assumed that Giorgi was a third party who had no concern with the dispute when in fact Giorgi was the employer who had caused

the dispute. (R. 332, 333.) Giorgi's economic interest in selecting the non-union contractor is pointed out in the dissent because of the natural reason that he thus obtained a lower rate.

In all of these regards Giorgi cannot be considered to be in the position of an employer whose only connection with a primary labor dispute is that he happens to buy either goods or service of another employer who is involved in a primary labor dispute with the union.

It should also be noted that the relationship between the general contractor and a subcontractor in the building and construction industry is not that of two equal parties engaged in a common venture, as assumed by the court below. The general contractor takes responsibility for the entire job and their usual practice is to carry out the large part of each job with their own employees and sublet the remainder to specialty contractors. The decision as to whether a particular part of the work will be performed by the general contractor with his own employees or by specialty trade contractors with their employees is a matter of considerable variation in the industry but the general contractor does choose whether he will perform the work himself or have it performed by a specialty trade contractor. The general contractor's responsibility for the entire job is ordinarily discharged by his general foreman who, even on large jobs, ordinarily directs the work of the general contractor's employees through trade foremen. The general foreman coordinates the work of the various subcontractors crews. Although he may not have power to give direct orders to the subcontractors' fore-

man, "he may give them information and comments" and disagreements arising in the course of the work are referred to the respective contractor for decision. Small contractors such as Langer usually act as working foremen on their jobs. It is apparent from the small annual volume of his business that unless he did so he would be unable to secure compensation which would be above that of a journeyman or foreman in the industry. (Appendix A *infra* pp. 88-91, 99-102, 103-104. See also a chronological record of the contacts made by a general contractor in the course of construction of a small house in Hearings, before the Temporary National Economic Committee, p. 5500.)

Again there is a fundamental distinction between Giorgi and a purchaser of materials, for Giorgi as the general contractor would either personally or through his general foreman have a direct relationship to the work performed by Langer's employees.

From all of these facts it may be seen that Giorgi's relationship to the primary labor dispute occasioned by the non-union condition on the construction job was not merely that of a "third party" who is "free to discontinue" his relationship to another employer who is involved in a direct labor dispute.

The dissenting judge below has pointed out the anomalies resulting from the majority view. If Langer had decided to perform the small $325 contract he secured from Giorgi by himself, Section 8(b)(4)(A) would not be applicable although the direct labor dispute between Local 501 and Giorgi would not have been different in any practical respect. Similarly, if Giorgi had been a general contractor

with an electrical department, the picketing would have been proper although, again, the various trades involved in this dispute and Giorgi himself would have had no different relationship to the dispute than in the instant case where Giorgi decided to secure the benefit of a non-union condition through the hiring of a non-union electrical subcontractor. We respectfully submit that the dissenting judge was correct when he, in effect, characterized Giorgi as a primary party to the labor dispute with Local No. 501 of the I.B.E.W. This view is supported by the unanimous decision of the Court of Appeals, District of Columbia Circuit in *Denver Building and Construction Trades Council et al* v. *National Labor Relations Board, supra.* See *Mills* v. *Plumbers' Union,* 83 F. Supp. 240.

It is our view that the above analysis of the intent of Section 8(b)(4)(A) in its application to the facts of this case does not nullify the words in the statute prohibiting labor activities an object of which is to force or require any employer or other person to cease doing business with any other person. We do not contend that Section 8(b)(4)(A) is limited to a product boycott. If the same facts and circumstances exist in a case where the business relationship deals with services or other matters, the section is applicable. For example, the "cease doing business" phrase of Section 8(b)(4)(A) would have been applicable to Giorgi, if a union such as the Engineers had a primary labor dispute with a professional engineering firm in the City of New York from whom Giorgi was securing engineering services over wages or recognition and then sought to bring Giorgi into the dispute by striking Giorgi at a time

when he was employing operating engineers engaged in excavation work. The section would have been violated even though there was no product boycott prohibited by the language of Section 8(b)(4)(A) which makes illegal labor activities an object of which is "forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, . . ."

Another illustration of the application of the "cease doing business" phrase of Section 8(b)(4)(A) would be the following case:

> Giorgi rents property he owns in the City of New York to Employer A who operates a restaurant on the property. Employer A is in a dispute with a union representing its employees over wages or recognition. The restaurant union secures the cooperation of the construction unions to stop Giorgi's construction job in Greenwich, Connecticut, to force Giorgi to cancel his lease to Employer A and thus secure better terms for the resolution of the substantive issue involved in the labor dispute at the restaurant.

(Any constitutional issues raised by these hypothetical illustrations are not discussed in this brief.)

3. The Union was Engaged in a Primary Labor Dispute With Langer.

The court below assumed that the union had a primary labor dispute with Langer but that this was the only primary labor dispute in the case (R. 327, 328). We believe the first assumption is correct; we disagree with the second assumption for the reasons stated above showing that

the union also had a primary labor dispute with Giorgi because of the non-union condition on the job.

Even if it is accepted that the court below did not err in its description of Giorgi as a third party neutral to the labor dispute, we contend that on the facts of this case and of the building and construction industry, the picketing was not prohibited by Section 8(b)(4)(A) of the Act because the effects of the single act of picketing on Deltorto's employees and through them upon Giorgi were collateral to the allowable direct picketing against Langer.

The court below conceded that the instant case might have been of this sort if Langer's non-union employees had been on the job at the time of the picketing (R. 327). The court then listed two situations in which the legal question remained open had the fact been that Langer's non-union employees were on the job at the time of the picketing: (1) if Patterson's only purpose had been to induce the non-union employees to quit and (2) if Patterson had intended to exert pressure on Giorgi, which included pressure on Langer (R. 327, 328). The court also left open the question of whether the section covers the situation in *Douds* v. *Metropolitan Federation of Architects*, 75 Fed. Sup. p. 672 where the suppositious third person was only a disguise for the employer (R. 328).

The National Labor Relations Board appears to have adopted the theory that the physical *situs* is the single factor to be used in determining the distinction between allowable secondary action and prohibited action under Section 8(b)(4)(A) of the Act. Thus, in the petition filed by the

Board for a writ of certiorari in *International Rice Milling Co., Inc.* v. *National Labor Relations Board* (No. 313, October Term 1950) the Board states that picketing at the premises of an employer with whom a union is engaged in a labor dispute is primary and does not violate Section 8(b)(4)(A) even though an object of the picketing is to induce employees of neutral employers, who approach the picket line in the course of their employment, not to cross it (p. 5). Prominent among the cases cited in support of this view is *Ryan Construction Corp.*, 85 N.L.R.B. 417 where the union representing the employees of the manufacturing plant placed a picket line around all the entrances to the property of the plant including the entrance through which the construction employees of the building contractor went in reaching the place where they were engaged in constructing an addition to the plant. The Board states that there is an opposite legal result if the picketing occurs at the premises of a neutral employer. A case cited by the Board in this connection is *United Brotherhood of Carpenters et al* v. *Wadsworth Building Co. et al*, 81 N.L.R.B. 802; Petition, pp. 9, 10, where the union had a primary labor dispute with Wadsworth, a manufacturer of prefabricated housing, and picketed Klassen and Hodgson at the construction job where the materials supplied by Wadsworth were to be used. The Board further is of the view that in the intermediate situation where the picketing occurs "at a project where two or more employers, only one of whom is involved in a labor dispute, are at work, the Board holds that the picketing is secondary if the evidence shows that the picketing is designed to induce employees of one of

the neutral employers to cease work for the purpose of disrupting business relations between the neutral employer and the employer who is engaged in a dispute'' (*ibid.*, p. 10). The petition cites in support of this view the three building trades cases, including the instant case, which are now before this Court.

As pointed out above, we disagree with the Board's conclusion contained in its assumption that in the instant case Giorgi was a ''neutral'' employer. It is also our contention that the *situs* theory, espoused by the Board, is not an exclusive means of making the necessary distinction between actions prohibited and not prohibited by Section 8(b)(4)(A) of the Act. In each of the cases arising under this section of the Act the *first* question is whether there is any secondary labor activity and this in turn includes the proper definition of the parties to the primary labor dispute or labor disputes. If it be found that under the facts of the case there is secondary labor activity, then the *second* question is whether such secondary labor activity is allowable as a collateral or incidental result of the primary strike or picketing. In the latter type of case, as where the employees of an employer not involved in the primary labor dispute refused to cross a picket line established in the course of a strike for wages, there is a disruptive effect on the business relations between the neutral employer and the primary employer but under the *situs* theory such harm is allowable if the right to strike for basic issues such as wages, hours and working conditions, or recognition, is to be given any real effect.

An illustration of a case which deals with the first ques-

tion, i.e., the determination of whether there is any secondary labor activity is *Douds* v. *Metropolitan Federation of Architects,* U.S.D.C. So. Dist. of N. Y., 75 F. Supp. 672, which has received the general approval of the lower courts and also the approval of the Board. In that case the District Judge ruled that Section 8(b)(4)(A) was not violated by the act of picketing a place of business separate from the place of business where the union had its initial labor dispute. The union had struck Ebasco whose employees were represented by the union as its bargaining agent. Ebasco then transferred a portion of its work to Project Engineering Company, a subcontractor whose relationship to Ebasco has been established approximately one year before the strike. The union then picketed Project. The latter company had an inception completely independent of Ebasco or its influence and there was no common ownership of any kind. The District Judge stressed the events which showed that Project employees did work which but for the strike of Ebasco's employees would have been done by Ebasco. The "economic effect upon Ebasco employees was precisely that which would flow from Ebasco hiring strike breakers to work on its own premises."

It is respectfully submitted that the central reason for the allowability of the picketing at the premises of Project is not the fiction that Project, which was truly independent, was in actuality a disguise for Ebasco. The decisive factor is that Project threw its economic weight onto the scales in behalf of the employer involved in the primary labor dispute between Ebasco and the union. In that way Project became a second party to the primary labor dispute even though the *situs* of the picketing before the

Project was different from the *situs* of Ebasco where the dispute had commenced initially.

The District Court in the *Metropolitan Federation of Architects* case refused to hold "that corporate ownership or insulation of legal interests between the businesses can be conclusive as to neutrality or disinterestedness in a labor dispute" (*supra*, p. 677). This reasoning applies equally to the complex interrelated facts of the relationships among employers on a construction job, though from a common law point of view they may be deemed independent.

We contend further, however, that even if the designation, by the Court below, of Giorgi, and Deltorto as enmeshed with him, as neutrals is sound, the proper application of the so-called *situs* rule would call for the conclusion that Section 8(b)(4)(A) of the Act does not apply here as it has been held not to apply in the *Ryan Construction Corp.* case, *supra*. The decisive factor in the conclusions of both the court below and the Board on this point appears to be the assumption of fact that the intent of the picketing was only to disrupt the business relationship between Giorgi and Langer and that the picketing was not intended to affect the employees of Langer although the union did have a dispute with Langer.

The court below relied in reaching this result upon the fact that Langer's employees were not on the job at the time of the picketing. It is respectfully submitted that this is an over-simplification of the picketing in this case which is typical in the building trades.

The excerpts from Bulletin No. 967 of the Board of Labor

Statistics make it clear that even in the course of a particular construction job the employment of any given trade is temporary and that employees go on and off the job in accordance with the progress of construction: [The building trades worker]" . . . is subject to layoff at any time, either permanent (as the work for which he was hired approaches completion) or temporary, with instructions to return at a stated time, because of a temporary shortage of material or to allow other trades to complete work which must be done before he can proceed further with his own work" (*infra*, Appendix A, p. 97). In the instant case, Langer's non-union electricians had started to work and had completed the "roughing" operation at the time of the picketing (R. 77). It is entirely clear from the record that electrical work remained to be performed on the construction of the house and that Langer would have returned to the job in the normal course of construction (R. 77, 78). The exact time when Langer's employees would have otherwise returned is not shown by the record.

We submit, therefore, that under the facts of this case it is entirely reasonable to infer that one of the purposes of the picketing was to induce the non-union electricians not to return to work on the picketed job. If it is true that a subcontractor in the building trades may be the subject of direct picketing it would be entirely unrealistic to say that the right can be exercised only at those points of time when the construction job calls for the actual presence of his employees on the job. The time for such employment could be arranged for after nightfall when the picketing could be reduced in its effect to a complete nullity.

To say that Patterson intended as a reasonable consequence of his picketing that Langer's employees would thereby be induced not to return to work, is not fanciful. Union and non-union electricians are not distinguishable from each other by mere observation. They wear the same working clothes, use the same tools and perform the same work operations. Union men do not carry signs on the job proclaiming their status.

The private knowledge of an electrician of the fact that he is non-union is quite a different matter from its public advertisement through picketing. It was only through picketing that Langer's non-union electricians could be induced peacefully not to return to work. That pressure is registered upon the individual employee to quit work or not to return to work by picketing is an ordinary fact in the field of labor relations.

The record is replete with information on how the fact of the picketing circulated among the parties interested in this job. It is reasonable to assume that Langer's employees would learn of the fact just as Langer did, although he was not on the job at the time of the picketing.

The substantive issue in the primary labor dispute between I.B.E.W. Local No. 501 and Langer was Langer's breach of his contract with the local (R. 66). Langer had apparently violated the union security clause of the agreement in June, 1947 (R. 73, 74). He was advised that he had broken the contract in August, 1947. No exact date is specified for this particular month (R. 75, 76). The advice

was apparently given by the chairman of a joint labor management board, presumably set up to handle disputes under agreements (*ibid*).

It is respectfully submitted that the question of whether the agreement between Langer and I.B.E.W. Local No. 501 which was first entered into October, 1944 (R. 66) contained a closed shop provision is immaterial to the issues in this case. At the time that contract was entered into, such a provision was entirely legal and continued to be legal for one year following June 23, 1947 (Sec. 102).

Under the provisions of Sec. 102 of the Act Patterson could have elected not to rescind the agreement because of its violation and requested resumption of relations under the agreement, which would have been legal at the time of the picketing, i.e., April 16, 1948. This is so since the record merely shows a statement by the chairman of the trade board (R. 76) rather than a cancellation of the agreement by the union. Furthermore, there was no allegations in the complaint of any violation of Section 8(b)(2).

Under the preceding analysis, it is contended that a proper application of the *situs* theory would hold the picketing at the house was direct because of the primary dispute between Local No. 501 and Langer and the effect on Deltorto's employees was a collateral result allowable under the protection granted direct strikes or picketing for organizational purposes. If the contentions submitted in this brief are accepted that the dispute between Local No. 501 and Giorgi was primary, then the effect of the picketing on Deltorto's employees was a collateral and allowable result, under the *situs* theory, of the direct picketing of Giorgi.

III.

If Congress Intended Section 8(b)(4)(A) To Be Applied To Peaceful Picketing Under the Circumstances Of This Case, the Section Violates the Free Speech Protection Of the First Amendment To the Constitution.

If Section 8(b)(4)(A) of the Act was properly interpreted by the court below as applying to the facts of this case, it is our further contention that the enforcement of the order prohibiting peaceful picketing would be in conflict with applicable decisions of this Court under the First Amendment on the scope of the constitutional protection of peaceful picketing in labor disputes.

This Court has decided a number of cases in the October, 1949, Term which restrict the language of earlier decisions on picketing as free speech to the facts of such earlier decisions. *Teamsters* v. *Hanke*, 339 U. S. 470; *Hughes* v. *California*, 339 U. S. 460; and *Building Service Employees International Union, Local No. 262* v. *Gazzam*, 339 U. S. 532.

The effect of these decisions is to permit the restraint of peaceful picketing which is intended to violate public policy as announced by state legislation, or even by a state court, in the absence of legislation. There is nothing in these decisions, however, which reverses the actual holdings of the earlier cases.

Thus, it is stated in *Teamsters* v. *Hanke*, *supra*, pp. 478-479, that: "What was *actually decided* in *American*

Federation of Labor v. *Swing*, 312 U. S. 321, *Bakery and Pastry Drivers and Helpers Local* v. *Wohl*, 315 U. S. 769, and *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293, does not preclude us from upholding Washington's power to make the choice of policy she has here made. In those cases we held only that a State could not proscribe picketing merely by setting artificial bounds, unreal in the light of modern circumstances, to what constitutes an industrial relationship or a labor dispute." (Italics supplied.)

The continuing validity of the holding in the *Swing* case, *supra*, was further indicated by this Court in the *Gazzam* case, *supra*, p. 539, as follows:

"The state has not here, as in *Swing*, relied on the absence of an employer-employee relationship. Thus, the state has not as was the case there, excluded 'workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.' 312 U. S. at 326."

These recent decisions of this Court do not establish the rule that all peaceful picketing is removed from the protection of the First Amendment. Question is, therefore, raised whether under the holdings on this point, the ruling of the court below applying Section 8(b)(4)(A) to the facts of this case is violative of the First Amendment.

The court below, in its consideration of the constitutional issue of free speech, concluded that there was no absolute

protection of picketing as such (R. 331-332). This is not our contention.

We urge that the drawing of the line of permissible contest under the interpretation of Section 8(b)(4)(A) by the court below is unreal in the light of the facts of this industry and, therefore, does not constitute a sufficient factor to balance the abridgement of freedom of expression in this case.

With respect to this latter point, the court below stated that "Congress, in the search for a compromise between the conflicting interests of employees in collective bargaining and that of *neutrals* in avoiding involvement in *quarrels not their own*, decided to draw a line at *secondary boycotts;* and the propriety of the decision is not for us" (R. 332). (Italics supplied.)

We respectfully submit that the court below assumed certain conclusions which are not consistent with the record or with the decisions of this Court.

In *Carpenters and Joiners Union of America, Local No. 213* v. *Ritter's Cafe*, 315 U. S. 722, this Court in a five to four decision upheld a restraint on picketing under the State anti-trust statutes where building and construction unions picketed a cafe owned by Ritter because Ritter had let a contract for the construction of a building completely unrelated to the cafe, and one and one-half miles away from the cafe, to a contractor who employed non-union men. There was no labor dispute between Ritter and the Cafe's employees; nor were any building trades employees, such as carpenters and painters employed at the Cafe.

The majority of this Court emphasized the fact that the prohibition was directed against picketing a business [the cafe-restaurant industry] wholly outside the economic context of the "real dispute" [non-union conditions at building project—building and construction industry]. The *Swing* case, *supra,* was distinguished on the ground that there circumstances existed where there was an "interdependence of economic interest of all engaged in the same industry."

The Court stated that:

> "In the circumstances of the case before us Texas has declared that its general welfare would not be served if, in a controversy between a contractor and builders workers' unions, the unions were permitted to bring to bear the full weight of familiar weapons in industrial combat against a restaurant business, which, as a business, *has no nexus with the building dispute* but which *happens* to be owned by a person who contracts with the builder." (*Carpenters and Joiners Union of America Local No. 213* v. *Ritter's Cafe, supra,* p. 726).

It will be noted that the wages of the cafeteria employees and their other conditions of labor did not have any direct economic relationship to the wages and other conditions of labor in the building trades.

In the instant case, the facts do not raise a question of picketing an unrelated industry; the picketing was not only in the same industry but in the local wage area and on the very job where the labor dispute or disputes had their

situs. Furthermore, the interdependence of economic interest was a substantial factor not only in the local wage area for electricians but also for the other crafts of employees on the particular job. Non-union conditions on the dwelling house at Greenwich, Connecticut, were of direct interest to electricians in the area insofar as the stability of the wage rates in the area are concerned. They were also of direct interest to the carpenters and other union trades working on the dwelling house, for it is a commonplace that non-union rates in one craft or trade have a necessary downward effect on the rates paid to other crafts or trades in the same local area and on the same construction job.

The importance of this interdependence of employee economic interest has been given constitutional recognition by this Court in the *Swing* case, *supra.* There a judgment holding that an injunction should issue against the picketing of a beauty shop by a stranger union which did not have an employer-employee relationship with the shop, was reversed on the following grounds: "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. *American Foundries* v. *Tri-City Council,* 257 U. S. 184, 209. The right of free competition cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be

relevant to their interests, can no more be barred because of concern for the economic interest against which they are seeking to enlist public opinion than could the utterance in *Thornhill's* case." *Ibid.*, 312 U. S. 321, 326. See *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293.

It is interesting to note that the very same quotation relied upon by this Court in the *Swing* case, *supra*, was heartily approved by Senator Taft in his colloquy with Senator Pepper during the debates on the Bill in the Senate (93 Daily Cong. Rec. 4321; N.L.R.B., Legislative History, 1106-1107.)

In the instant case a reading has been given to Section 8(b)(4)(A) by the court below as meaning literally that picketing is prohibited if it has the effect of requiring one employer to discontinue *any* business relationships he may have with *any other* person (R. 327). The only test applied by the court below is based on the form and not the content of the alleged "secondary boycott" (R. 331-332). The Court appears to have been of the view that if there are two employers involved and the relationship between such employers can be described as a "doing business" relationship under the usual meaning of that term, then picketing which may have the effect of disrupting that business relationship is prohibited by Section 8(b)(4)(A), although the Court appeared to concede that the accidental factor of the physical location of the picketing might justify it if the picketing was directed solely against the so-called primary employer and the effect on the employees of the so-called "secondary employer" was an incidental and collateral result of the picketing.

The District Court in *Douds* v. *Metropolitan Federation of Architects, supra,* has pointed out that to give literal effect to the dictionary meaning of the "cease doing business" phrase would result in such absurdities as the protection of the business relationship between the primary employer and his employees or between a struck primary employer and his customers (*Douds* v. *Metropolitan Federation of Architects, supra,* p. 675).

We have contended, *supra,* this was not the intent of the Congress. We respectfully submit that if it was, then the Congress has drawn a line of permissible industrial contest which is as arbitrary as the line struck down by this Court in the *Swing* case, *supra.*

To warrant an abridgement of the constitutional right of free speech, there must be a countervailing public policy which justifies the abridgement. This may, perhaps, be found in the public interest of limiting the exercise of labor's economic power to employers directly involved in a substantive labor dispute with a union. We contend that the requisite justification for the abridgement of free speech certainly cannot be found in the arithmetic fact that more than one employer's economic interest is adversely affected by such picketing. Nor is it reasonable to conclude from the actual cases which have been cited on the subject, that the only administrative method by which the congressional policy of prohibiting the extension of industrial disputes to so-called innocent neutrals can be accomplished is by giving literal effect to the language of Section 8(b)(4)(A) which bars, in a dictionary sense, strikes or similar labor activity, an object of which is to force or require "any

employer or other person . . . to cease doing business with any other person." It is suggested that the District Judge in the *Douds* case, *supra,* was proceeding on the fundamental constitutional rule of the *Swing* case when he stated that "I am unable to hold that corporate ownership or insulation of legal interests between two businesses can be conclusive as to neutrality or disinterestedness in a labor dispute." (*Id; supra,* p. 677.)

In the instant case Giorgi, the general contractor, was not an innocent third party to the labor dispute. He caused it by employing non-union electricians (through Langer) on the work he had contracted to perform.

The picketing did not occur at another establishment or in another industry. It occurred on the very job where the non-union electricians were employed and which the union deemed to be unfair.

Under these facts, it is our contention that the same considerations which lead to the conclusion that the labor activities in this case did not constitute a secondary boycott prohibited by Section 8(b)(4)(A) also lead to the conclusion that, if Congress intended the prohibition to apply, there is a violation of the freedoms of the individual which the First Amendment seeks to protect.

This is particularly true in the building and construction industry where there is always more than one employer on even the smallest job. Peaceful picketing for whatever reason, if successful, can always be construed as having been the effective agent in causing the termination of a literal "secondary" business relationship. The economic facts of this industry coupled with the broad phase "an object" in

Section 8(b)(4)(A), if interpreted literally and without relation to the intent of Congress as discussed *supra*, would mean that any strike or picketing for economic reasons or organizational objectives would be enjoinable because of its effect on the multiple employer relationships on the job.

We believe that although the Congress intended to apply stringent restrictions to labor by means of the Act, it did not intend to go as far as prohibiting strikes or picketing for organizational or economic objectives (See Conference Report on the Act, 80th Cong., 1st Sess., H. Rep. No. 510, p. 43; 93 Daily Cong. Rec. 3950; N.L.R.B., Legislative History, L.M.R.A., 1005). In this connection, we wish to urge again that the intent of Congress was evidenced by the statements of the majority Congressmen in charge of the Bill; not by the minority which was sincerely endeavoring to convince the country of the utterly destructive effects of the proposed legislation. If it is held, however, that the Congress intended such a result, we contend the Act is violative of the First Amendment.

IV.

Pursuant To the Provision of Section 8(c) of the Act the Picketing In This Case Was Not Evidence of a Violation of Section 8(b)(4)(A).

We also contend that even if it is assumed that Patterson's acts constituted a violation of Section 8(b)(4)(A) of the Act, and such application of the Act is constitutional, nevertheless there was no basis for issuance of the order in this case because under Section 8(c) of the Act the picketing under the facts of this case could not constitute evidence of such violation.

Section 8(c) follows the enumeration of employer unfair labor practices in Section 8(a) and union unfair labor practices in Section 8(b). It provides that:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice *under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.*" (italics supplied.)

It is our view that the Board's affirmation of the Trial Examiner's findings except such as were inconsistent with its own report constituted an affirmation of the Examiner's finding, that in the circumstances of this case the picketing by Patterson and his talks with various parties in this case did not contain any "threats of reprisal or force or promise of benefit" (R. 281, 265 - 281; 296, 297). This was also the view of the court below since it assumed that such was the action of the Board in formulating its conclusions on the subject of the effect of Section 8(c) in this case (R. 328).

It is our contention that the adoption of this assumption by the court below, which we believe to be correct, required the court to hold that the picketing and Patterson's talks came within the language of Section 8(c) and therefore did not constitute an unfair labor practice under Section 8(b)(4)(A) of the Act. The court below has in effect rendered Section 8(c) empty of any meaning or effect in its possible application to the unfair labor practice provisions of the Act relating to unions, although the provisions of

Section 8(c) continue to have substantial meaning in immunizing certain employer conduct which, previous to the enactment of Section 8(c), were deemed unfair labor practices under the National Labor Relations Act.

It is interesting to note that in construing Section 8(c) of the Act the court below and the Board dropped the literal approach to the interpretation of statutory language which they utilized in determining the applicability of Section 8(b)(4)(A) to the facts in this case. The court below apparently realized that it was reading out of the Act any real effect of Section 8(c) in its application to union unfair labor practices. Its conclusions, however, were based largely on the view that to give Section 8(c) a meaning as broad as its language would result in nullifying other provisions of the Act. The court below specifically referred to the language of Section 8(b)(2) which prohibits "causing or attempting to cause" an employer to violate the union security provisions of Section 8(a)(3):

> "We do not believe that Congress meant to allow a union to persuade an employer so to discriminate even though it does so without threats or promises."

A similar view was taken with respect to the language of Section 8(b)(2) which forbids "causing or attempting to cause" an employer to discriminate against an employee because he had been put out of a union for any reason but failure to pay his dues (R., 328-329).

The National Labor Relations Board has pointed out with respect to this very issue that:

"The words 'cause or attempt to cause' also clearly imply something more than a bargaining demand. It is noteworthy that the words 'persuade or attempt to persuade' were used in Section 8(b)(2) in the Senate bill as originally passed, but were changed in conference to 'cause or attempt to cause.' In explaining this substitution, Senator Taft said that the House conferees had objected to the language 'on the ground that it seemed inconsistent with the provision guaranteeing all parties freedom of expression.'" (In the matter of *International Typographical Union,* 86 N.L.R.B. No. 115, 25 L.R.R.M. 1002; See also *Wadsworth,* 81 N.L.R.B. 802, 808, 814.)

It will thus be seen that it was the direct intent of Congress, based on its interpretation of Section 8(c) of the Act to prevent Section 8(b)(2) from having the broad meaning relied upon by the court below in explaining its position which renders Section 8(c) nugatory insofar as the union unfair labor practice sections of the Act are concerned.

The court below also ruled that Section 8(c) could not be applicable to Section 8(b)(4)(A) since that would excuse a union or its agent which induces another union to strike for any of the four purposes forbidden in that section. It relied upon the common law theory establishing criminal or tortious liability for one who advises the commission of a wrongful act. We respectfully contend that the court below overlooked the fact that Section 8(b)(4)(A) must be taken in conjunction with Section 10 of the Act and its overriding purpose of freeing commerce from obstructions. Section 8(b)(4)(A) is not intended to punish for wrongs committed.

It is rather intended to restrain the performance of actions which are deemed injurious to commerce. The purpose of Congress is achieved by providing for the enjoining of the union which has been induced by another union to commit a prohibited act, since it is the induced union which has jurisdiction over the employees who are engaging in the strike or concerted refusal to work.

If this initial premise of the Court, that the common law theory holding a third party liable for instigating the commission of a tortious act proves Section 8(c) not applicable to Section 8(b)(4)(A), was in error in light of the congressional intent, it was equally so in its application to the type of alleged violation which occurred in this case. The Court recognized the difficulty of using the tort theory because the fact was that in this case the persons instigated had not committed any wrong. Section 8(b)(4)(A) prohibits a labor organization or its agents from engaging in a strike for an object prohibited by Section 8(b)(4)(A). It does not prohibit employees from acting in concert without the participation of the union or its agents in striking for an object prohibited by this section of the Act.

Finally, the court below apparently interpreted Section 8(c) as covering utterances which contain more than bare inducements and are accompanied by discursive argument (R. 330-331). This interpretation is based apparently upon the language of the Senate Report indicating that Section 8(c) was intended to adopt the rule announced by this Court in *Thomas* v. *Collins*, 323 U. S. 516. It should be noted that the picket sign carried by Patterson stated merely that "This job is unfair to organized labor." The placard

also carried the identifying number of the local union of the I.B.E.W. "501", of which Patterson was the business representative (R. 258). We believe that the measure of protection afforded by Section 8(c) of the Act is not determined by the relative length of the opinion expressed by the party who becomes the subject of an unfair labor practice complaint. There was not contained in this expression any "threat of reprisal or force or promise of benefit" and it, therefore, should have been held immune under Section 8(c) of the Act.

The Board has been more realistic in its treatment of Section 8(c) *Wadsworth* case, 81 N.L.R.B. 802. The minority (two members) made an exhaustive analysis of the legislative history of the Act leading them to the conclusion that Section 8(c) of the Act was applicable to peaceful picketing. The majority recognized the force of this legislative history and concluded that Section 8(c) was in direct conflict with Section 8(b)(4)(A) (*id, supra* 807-816, 820-822). They went on, however, to take the position that since Section 8(b)(4)(A) was specific and Section 8(c) was general, the specific provisions of the Act would have to control.

We believe this conclusion of the three members of the board is contrary to the intent of Congress which made a serious point of its desire to give equal freedom to both employers and unions.

The legislative history of the Act shows that the free speech section of the Labor Management Relations Act of 1947 was passed by the House in the following form:

"Sec. 8(d)(1) Notwithstanding any other provision

of this section, the following shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act:

"Expressing any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, if it does not by its own terms threaten force or economic reprisal."

The House Report states with respect to this provision of the Bill, that

"This guarantees free speech to employers, to employees, and to unions . . . nothing that anyone says shall constitute or be evidence of an unfair labor practice unless it, by its own expressed terms, threatens force or economic reprisal. This means that a statement may not be used against the person making it unless it, standing alone, is unfair within the express terms of Sections 7 and 8 of the amended Act" (80th Congress, 1st Session, House Report No. 245, p. 33).

The Senate Bill as reported, provided that:

"The Board shall not base any finding of unfair labor practice upon any statement of view or arguments, either written or oral, if such statement contains under all the circumstances no threat, express or implied, of reprisal or force, or offer, express or implied, of benefit."

In its report the Senate explained the provision relating to free speech as follows:

> "Another amendment to this section would insure both to employers and labor organizations full freedom to express their views to employees on labor matters, refrain (*sic*) from threats of violence, intimation of economic reprisal, or offers of benefit. The Supreme Court in *Thomas* v. *Collins* (323 U.S. 516) held, contrary to some earlier decisions of the Labor Board, that the Constitution guarantees freedom of speech on either side in labor controversies and approved the doctrine of the *American Tube Bending case* (134 F.(2d) 993). The Board has placed a limited construction upon these decisions by holding such speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated (*Monumental Life Insurance*, 69 N.L.R.B. 247) or if the speech was made in the plant on working time (*Clark Brothers*, 70 N.L.R.B. 60). The committee believes these decisions to be too restrictive and, in this section, provides that if, *under all the circumstances*, there is neither an expressed or implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement. The Board, of course, will not be precluded from considering such statements as evidence" (80th Cong., 1st Sess., S. Rep. No. 105, pp. 23-24). (Italics supplied.)

The Conference Report resulted in the provisions now contained in the statute set forth above as Section 8(c).

The analysis presented by Senator Taft, who was in charge of the Bill, to the Senate on June 5, 1947, which explained the differences between the Conference agreement and the Senate Amendment, set forth the following explanation of the agreement on Section 8(c):

> "Subsection (c) relating to the right of employers, employees and labor organizations to express opinions and views freely *conforms substantially with the language of subsection 8(d)(1) of the House bill and is a substitute for section 8(c) of the Senate amendment.* The House conferees were of the opinion that the phrase 'under all the circumstances' in the Senate amendment was ambiguous and might be susceptible of being construed as approving certain Board decisions which have attempted to circumscribe the right of free speech where there were also findings of unfair labor practices. Since this was certainly contrary to the intent of the Senate, as the accompanying report of the committee with respect to this subsection indicates, *the Senate conferees acceded to the wish of the House group that the intent of this section be clarified.*
>
> "Since the adoption of the conference agreement some inquiries have been received as to whether or not the guarantee of freedom of expression contained in this section is limited to expressions 'which are not printed, graphic. . . .' These words are not words of limitation but were added in the House bill so as to make it clear that freedom of expression was not confined to oral utterances. The language of the report of

> the House committee makes it clear, moreover, that what the sponsors of the House bill had in mind were primarily oral utterances. There has also been some question raised with respect to the phrase 'constitute or be evidence of an unfair labor practice.' The purpose of this language is to make it clear that the Board is not to use any utterances not containing threats or promises of benefit as either an unfair practice standing alone or as making some act which would otherwise not be an unfair labor practice, an unfair labor practice. It should be noted that this subsection is limited to 'views, argument, or opinions' and does not cover instructions, directions, or other statements which might be deemed admissions under ordinary rules of evidence. In other words this section does not make incompetent, evidence which would ordinarily be deemed relevant and admissible in courts of law" (93 Cong. Record 6601; N.L.R.B., Legislative History, L.M.R.A., 1540-1541). (Italics supplied.)

As stated previously, the above legislative history shows the strong intent of Congress to apply the free speech amendment equally to both employers and unions. It also shows that the Congress intended the National Labor Relations Board to predicate its findings on alleged unfair labor practices on the language contained in the specific expression which was the subject of the allegation.

The extent of the protection afforded by this amendment to expressions is shown most clearly in the Senate Report which disapproved of the "captive audience" rule of the Board and of the Board's practice in relying upon other evidence of unrelated practices in violation of the Act to

make an expression of views, otherwise proper, a violation of the Act.

The Board has in fact applied Section 8(c) in accordance with the expressed intent of Congress insofar as it relates to employers. Thus, the Board, prior to this section of the Act, considered expressions by employers to "captive audiences" as a basis for finding an unfair labor practice. *Clark Brothers, Inc.*, 70 N.L.R.B. 802, affirmed 163 F.(2d) 373 (2nd Cir.). The "captive audience" doctrine has been overruled by the Board on the basis of Section 8(c) in the case of *Babcock and Wilcox*, 77 N.L.R.B. 577.

The effect of Section 8(c) with respect to employer unfair labor practices has been to immunize expressions of the employer even when such expressions were associated with something more than the utterance itself. The employer cannot be held to have engaged in an unfair labor practice by speech alone even though it is a well known fact that the economic power of the employer makes expressions by him something more than expressions of views by outsiders having no relationship with the employees which can produce benefit or adverse consequence to them. Such expressions are also immunized even though the employer actually exercises his economic power to require compulsory attendance during work time to listen to his expressions with respect to union matters.

It is our view that, if equal effect is given to Section 8(c) in its application to alleged union unfair labor practices, the picketing under the circumstances of this case is also immunized by Section 8(c).

It is not our contention that Section 8(c) immunizes all peaceful picketing and that the line of distinction is to be drawn between violence and non-violence. It has become customary to think of all peaceful picketing as constituting one category. The fact is that there are different types of peaceful picketing, some of which may secure immunity under Section 8(c) and others of which do not secure such immunity.

We believe that the crucial fact in this case is that the picketing was carried out by the agent of a union which had no power to cause benefit or harm to the union members on the job. This was not a case of picketing by the representative of a union whose members were on the job. Such picketing might well be construed to fall within the exceptions stated in Senator Taft's analysis quoted above, which noted that the language of Section 8(c) "is limited to 'views, arguments or opinion' and does not cover instructions, directions or other statements which might be deemed admissions under ordinary rules of evidence."

Section 8(c) might also be inapplicable to a case where there was no picketing but a more subtle or indirect form of inducement to action had been taken by the carpenters union having jurisdiction over the carpenters, to cease work on the job.

In the instant case the agent of the electricians' union which had no employees on the job and which had no power, direct or indirect, over the carpenters on the job, expressed an opinion that the job was unfair to labor. The picketing could have been disregarded with impunity by the carpen-

ters on the job and it was in fact found, by the Examiner and apparently affirmed by the Board and the court below, that there was no threat of reprisal or force or promise of benefit contained in the picketing and other talks made by Patterson. We contend that this finding carries with it the conclusion that Section 8(c) does apply to the facts in this case.

We do not believe that the result reached by the Board in the *Wadsworth* case is required by principles of statutory construction although there is undoubtedly inconsistency between the application of Section 8(c) to peaceful picketing and some of the expressions of the proponents of the Bill in the legislative history of the Act. There is no such inconsistency between the statutory provisions of the Act. Both Section 8(c) and Section 8(b)(4)(A) can be given effect without nullifying either section. It is respectfully submitted that Section 8(b)(4)(A) should be read in accordance with the views of the Trial Examiner in this case as limited to verbal or graphic utterance which constitute a strike signal and picketing not in the nature of a strike signal which is accompanied by behaviour which includes violence or threats of violence or offers of monetary or other reward (R. 265-281).

V.

The Board Erred In Formulating A Blanket Cease and Desist Order On the Findings In This Case.

The order in this case is in conflict with rulings of this and other courts on "blanket" orders. There was no finding

by the Board that the acts of petitioners on the Giorgi job will probably be applied on jobs of other employers. Indeed, the Board dismissed that part of the complaint which alleged that Local No. 501 and Patterson had threatened to induce or encourage employees of employers other than Deltorto or Giorgi to strike or refuse to perform services in order to force said other employers to cease doing business with Langer. Nevertheless, the order as formulated by the Board and approved by the court below requires petitioners to

> "cease and desist from inducing or encouraging the employees of Nicholas Deltorto, or *any employer*, by picketing or related conduct, to engage in a strike or a concerted refusal in the course of their employment to perform any services, where an object thereof is to force or require Giorgi Construction Company, or *any other employer or person* to cease doing business with Samuel Langer" (R. 298, 336). (Italics supplied.)

See *N.L.R.B.* v. *Federal Engineering Co., Inc.*, 155 F.(2d) 17 (6th Cir.); *May Department Stores Co.* v. *N.L.R.B.*, 326 U. S. 376.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed and enforcement of the order of the Board should be denied.

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APPENDIX A

Excerpts from "Employment Outlook in the Building Trades," (U. S. Bureau of Labor Statistics, Occupational Outlook Series, Bulletin No. 967).

* * *

With respect to its labor force, the construction industry is outstanding in being an industry of journeymen; it is by far the largest industry in which this is the case. The skilled building trades make up the Nation's largest group of related skilled occupations—about three times as many as workers in the skilled machine-shop occupations, about eight times as many as in operation of railroad trains, about two and one-half times as many as in printing and publishing. Semiskilled workers are much less important, in building construction particularly; except for truck drivers, most of them perform services for the journeymen, and few of them take part in the journeymen's activity of using tools and installing materials. Unskilled workers (laborers) will continue to be needed permanently, as far as can now be seen, although their place has been reduced progressively by mechanization and further mechanization of unskilled operations seems virtually certain.

Journeymen have high hourly earnings and, during normal economic conditions, fairly high although seasonally irregular annual earnings. Status as a journeyman carries prestige; it means membership in a group universally recognized for skill and competence in a basic part of the country's economic life. It is an asset for employment in any

part of the country and, for the larger trades, in communities of any size. The work is satisfying, offering variety and opportunity to see the results of the work being done, in contrast to repetition and close specialization found in many other occupations. Journeyman status confers a greater degree of independence than that of most other occupations. A journeyman depends on his competence in the trade and on general economic conditions, rather than on either the fortunes or the good will of any particular employer; and he can change to another employer without penalty. His opportunity to establish his own business is greater than for the man in almost any factory occupation. While most such businesses are fairly small, they afford opportunity for expansion and many large contracting firms have been started and operated by former journeymen. For several contracting fields competition from persons with other backgrounds is keener than in the past, but the opportunities remain good for those with the appropriate combination of abilities.

The principal disadvantage of building work has been its extreme variation with general business conditions, so that a reduction in total nonagricultural employment or national income has been accompanied by a much greater reduction in construction employment. Less serious, but far from negligible in importance for the majority of workers, is seasonal lost time, even during comparatively good years. They must pay their yearly expenses from high earnings for about 8 or 9 months plus much lower earnings for the remaining months. Several weeks of continuous unemployment in winter is by no means uncommon, even in

good years. Unemployment compensation benefits are, of course, much below full-time earnings. *(Pages 1-2.)*

* * * *

Construction workers work in the contract construction industry (described on page 4), in force-account construction and maintenance, and as self-employed workers. In addition, some of them are employed on jobs having no direct connection with construction but using the skills of a construction trade. There is almost complete fluidity between these fields, so that a journeyman employed by a contractor at one time may be employed a few weeks later by a manufacturing firm to work on remodeling its plant office, or may be conducting a small business of his own as a self-employed workman.

The largest single field is the *contract construction industry*, for which average monthly employment was a little over 2 million during 1948, with a monthly range from 1,731,000 to 2,253,000. From January 1939 through December 1948 monthly employment ranged from 904,000 to 2,577,000.[1] A workman's employment in this industry is related to a given type of work rather than to any individual contractor, or even to any particular type of contractor. Thus, carpenters are employed mainly by builders and general building contractors, but any individual carpenters may in the course of a year be employed by a highway contractor to build forms for a concrete bridge, by an electrical or plumbing contractor to build a temporary job office and tool shed at the site where a large building is being put up, and by a carpentry contractor for the framing and rough carpentry

[1] These figures include other employees as well as members of the skilled trades.

on a church, as well as by one or more builders or general building contractors. Similarly a painter would ordinarily be employed by a painting contractor but might be employed by a general building contractor having his own painting crew, or by a general building contractor to paint a job office or even some of his construction machinery. The contractor designates the work to be done; plans the sequence of operations at least broadly, either in person or through a superintendent or foreman; supplies the materials as needed; supplies any machinery, equipment, and special tools that are needed; and assumes full responsibility for the financial outcome of his part of the total construction work (which may be the entire structure, or may be a single part of the job such as painting or electrical wiring). The contractor also is responsible for acceptability of the completed work to the owner or architect and to the building inspector and other appropriate public officials. A journeyman's responsibility is for competent performance of the work assigned to him and for notifying the foreman or contractor of any unsatisfactory conditions affecting his work, such as errors in related work of other trades.

Force-account employment, although smaller, is an important employment field. Here the employer is a business establishment or government body performing construction work for its own use, instead of engaging a contractor to handle it. In the field of new construction that is commonest for paving, although it is also used to some degree for all other types, including building. New construction projects carried out by force account can be very large, but usually are of moderate or small size because of the disadvantages

of forming and later dissolving large organizations for infrequent jobs of unusual size. The characteristics of such employment on new construction are essentially the same as those of employment by contractors on projects of the same type. Force-account work is more common, however, for maintenance, repairs, and minor alterations. Industrial plants, hotels, owners of office buildings and large apartment buildings, boards of education, State and county highway commissions, city water departments, organizations of all types employ workers directly to maintain and repair their property, to do remodeling as necessary, and to make minor improvements. Employment here is frequently on a year-round basis with wages often at a weekly or monthly rather than an hourly rate. Unless the property involved is very large there is very likely to be less specialization than in new work, so that a workman is often hired on the basis of doing all work within his own trade plus the commoner jobs in related trades. In some cases there is a combination of building work and shop work. Thus a maintenance painter in a hotel might refinish marred furniture as occasion arose, as well as doing painting, paperhanging and other decorating in the guest rooms, corridors, and other parts of the building.

Self-employment is the third large field. A self-employed workman is hired directly by a series of property owners or their agents for specific jobs. This has some of the characteristics of wage employment, and, in other respects, it resembles contracting. It is limited to small jobs, in which the workman can do most if not all of the work himself; he may hire one or two men to work for him occasionally, but

not regularly, and, in any case, works with the tools of his trade. He may be paid by the job and may include materials in an over-all price, or the materials may be provided by the owner; in other cases, he is paid by the hour or day. In any case he does not sublet work to others—if the job includes work which he cannot do (such as plastering or electrical work in small alterations consisting mainly of carpentry) the owner arranges for this directly. A self-employed workman resembles a contractor in taking responsibility for completion of the job, in planning the way in which it is to be done, in providing any equipment needed as well as hand tools, and (in most cases) in scheduling and ordering the materials needed even though the material bills may be paid directly by the owner. He resembles a wage employee in that his income is derived mainly from his own direct work.

Self-employment is commonest in those fields having a large volume of maintenance, repair, and small alteration jobs—particularly painting and decorating and carpentry. It is present in other trades also but is less common than it would otherwise be in the trades for which a State or municipal license is commonly required (especially plumbing and electrical work). It is, of course, completely impractical for any type of work needing expensive machinery or shop equipment. Self-employment is probably as common as ever for painting and decorating. For carpentry, however, it has met keen competition in many areas from home improvement establishments which seek small jobs of all sorts by active sales efforts, often with a sales room containing displays of the types of work they offer. *(Pages 3-4.)*

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In its organizational form, the contract construction industry is unique among American industries. This form has developed from the tremendous variety in its product, with consequent need for great flexibility, which in turn is provided by specialization. For most types of construction several contractors work jointly, each doing the kinds of work for which he is especially fitted.

The industry is usually classified into three groups of firms: Builders, general contractors, and special trade contractors. *Builders* operate on their own account, putting up houses; in some cases, apartment buildings; occasionally, stores or other nonresidential buildings. The houses are ordinarily built for sale, and the other buildings may be intended either for sale or for ownership and rental.[2] The builders decide on the characteristics of their projects; obtain designs; buy land; arrange financing; arrange for site improvements, such as water lines, sewer lines, and street paving; and in the building operations proper do the work corresponding to that of general contractors as described below.

The term "contractor" refers to a firm performing construction work authorized by others, rather than work undertaken on its own initiative. The form of authorization differs widely and is not limited to a written agreement to build a structure described in more or less detail by drawings and specifications at a stipulated price. There are numerous other types of written agreements, and in some

[2] Persons and organizations performing construction for their own use are not regarded as part of the construction industry even though they buy materials, hire workmen, and direct the work.

cases the authorization is verbal only. But decision to proceed, selection of land, obtaining of individual or stock architectural drawings, arrangement of financing and other matters separate from the construction operations themselves are the responsibility of the owner, and any advice or assistance which the contractor may give is outside of his basic function of carrying out the construction operations.

General contractors construct buildings and other structures and do alteration and repair work, on contract for owners. They take responsibility for the entire job, except that in some cases certain parts of the work are omitted from the general contract and arranged separately by the owner or architect. Standard practice is that general contractors carry out the major part of each project with their own forces and sublet the remainder to other contractors (special trade contractors), but usage with respect to the amount and kinds of work sublet differs greatly. There are three types of general contractors, based on the type of construction which they undertake: Building; highway, which includes other forms of paving such as city streets or airport landing strips; and heavy, which includes all other important forms of nonbuilding construction (dams, piers, sewer or water lines, dredging, tunnels, many other forms).

Special trade contractors carry out the work of a single trade or two or more closely related trades—painting, electrical work, plumbing with or without steam and hot water heating, sheet metal work with or without roofing, etc. Much of this work is done for builders or general contrac-

tors, while other jobs (most repair jobs, and some new jobs as well) are done directly for the owners. There is also secondary subcontracting, as when a plastering contractor receives a subcontract for plastering and lathing and sublets the lathing to a lathing contractor.

Ordinarily a contractor provides as well as installs all materials for his part of the project, but not uncommonly specified materials are provided for him by others, if the owner or general contractor has particularly favorable buying arrangements for certain items. The extreme case is "labor only" contracting, in which the person or firm awarding the contract provides all materials. This can be bona fide contracting, with the contractor operating an established permanent business and having the customary employer relationship to his workers. As such, it is found mainly in some of the specialized fields—setting of reenforcing steel or cut stone for general contractors, installation of numerous specialities in the ornamental metal field where a manufacturer's representative obtains an over-all contract but sublets installation to a local ornamental iron contractor, etc. This is entirely distinct from "labor only" subcontracting as a disguised form of piecework employment, described briefly on page 24.

The 1939 census of construction, reports 215,050 firms in the construction industry—3,705 builders, 29,641 general building contractors, 5,517 other general contractors, and 176,187 special trade contractors. Most of these were small. Well over half of the builders, about two-thirds of the general building contractors, and more than eleven-twelfths of the special trade contractors performed work valued at less

than $25,000 during the year.[3] In fact, almost a fifth of the general building contractors and three-fifths of the special trade contractors performed work valued at $5,000 or less. At the opposite extreme were a few large firms performing work valued at $500,000 or over. There were only 296 building contractors in this group, but their work performed was over $310,000,000, or more than a quarter of the work performed by all building contractors. Of the special trade contractors only 163 were in this class, but the value of work which they performed ($213,000,000) was nine-tenths as great as that of the 107,620 special trade contractors performing work valued under $5,000 ($233,000,000). *(Pages 4-8.)*

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Construction is active, strenuous work, but physical demands are not excessive. Most of the operations requiring principally muscle-power have been taken over largely by machinery, and for those where such a change has not yet been practical, such as carrying of heavy plumbing fixtures, custom and working agreements usually assign a sufficient number of men to prevent undue strain or risk of injury. Nevertheless the physical exertion of handling tools and materials is much greater than in most bench jobs and a greater degree of agility is required. Continuous standing is frequently involved, and from time to time it is necessary to squat, to work in cramped quarters, or to work in uncomfortable positions.

For many trades a large part of the work is outdoors, and for almost all trades much work is in unfinished build-

[3] Value of work performed excludes the value of work sublet to others and so is less than total gross operating income for the year.

ings. This means exposure to the weather and low temperatures for some of the indoor work. Artificial heat is commonly provided for indoor winter work after buildings are sufficiently enclosed, but the temperatures maintained are frequently lower than those customary for winter factory work.

Since most construction activities last only a few months, and all are regarded as temporary, the facilities provided are usually rather primitive. On fairly large jobs, drinking water is provided by portable fountains, but a hose or a bucket and dipper are still in widespread use. On large jobs, particularly in downtown city locations, toilet facilities are provided with standard fixtures connected to supply and waste lines, and sometimes these compare favorably with good factory toilets. Elsewhere toilet facilities are crude, consisting most commonly of temporary outhouses; on some small outlying jobs, no toilets of any sort are provided. Showers are seldom if ever provided except occasionally at the very largest metropolitan projects, or at work camps for projects in remote locations. No formal arrangement for washing before lunch is common, but running water is often available at a hose hydrant. A shed is customary for storage of clothing, lunches, etc., and for overnight storage of overalls and tools, without individual lockers; although locked outside of working hours, these give little protection against burglary, especially on small jobs not having a watchman.

The location of construction work in any area is changing constantly, so that wherever a worker lives he often has to make a fairly long trip to and from work. In cities of

moderate or large size a definite working area is usually established, which generally is the city itself exclusive of the suburbs; for jobs outside of this area, transportation cost is paid by the employer, and the time needed for suburban transportation is considered and paid for as working time. Comparable arrangements are commonly made for inconveniently located jobs within the designated working area during periods of labor shortage, but not at other times.

All skilled workers need tools, the number and total cost depending on the trade. These are owned by the journeymen, except that in the electrical and pipe trades working agreements frequently provide that all tools are to be provided by the contractors. A set sufficient for most needs is bought during apprenticeship. Later purchases are customary to obtain less common tools and new types of tools, to replace those lost or stolen, and to replace usable tools with improved or better-quality models. Theft of entire tool kits outside of working hours has been troublesome, especially on outlying jobs. Not so many years ago the entire loss, which for a carpenter would be well over $100, was borne by the individual workman. Working agreements now usually provide that at least a large part, and in some cases substantially all, of this loss be borne by the employer.

Employment is predominantly on an hourly basis, with time off for sickness or personal business accompanied by loss of pay. Lost time because of bad weather or other reasons beyond the workers' control likewise means loss of pay, a serious matter to bricklayers and others doing outdoor work. Holidays are unpaid, except that in a very few

areas working agreements provide pay for some of the trades on the major public holidays. Standard working hours have been established almost everywhere, most commonly from 8:00 to 4:30 on Monday through Friday; in some trades and localities the standard workday is 7 hours or 6 hours. Usually work at other times is paid for at a premium overtime rate, regardless of whether or not the standard hours have been worked.

Employment and lay-off practices are highly informal, in keeping with the flexibility of the construction industry. This informality is made practical by the craft or trade approach in training, whereby a fully trained worker can perform any type of work in his field. Hence, while workers are ordinarily laid off as soon as they are no longer needed, they are hired readily and with scarcely any formality at any project at which additional workers are wanted. Experience and preference within the rather broad field of any trade influences both applicant and foreman in hiring, but these are not rigid; a carpenter who enjoys the careful workmanship of "trimming" (installation of millwork, hardware, finish carpentry in general) would ordinarily seek such work if unemployed but, if necessary, would take and be acceptable for other carpentry work; and a foreman having trimming to be done would ordinarily prefer an applicant specializing in such work but, in the absence of such an applicant, would hire any competent carpenter for the work.

Employment in a given trade is naturally much more stable in any employment area than in the work of a single contractor. Some jobs are starting as others are finishing,

and some contractors are hiring workers as others are laying off. Hence, getting a new job is ordinarily a simple matter when construction is reasonably active, involving little lost time—often none at all. Even in good years, however, there is seasonal unemployment. As the rate of activity goes down seasonally from October to February, workers are being hired for new projects at a slower rate than they are being laid off at projects approaching completion. From late fall until early spring, lost time between lay-offs and new jobs is greater for most workers than in spring, summer, and fall.

For most trades migration is a matter of choice, although there are exceptions. When large construction projects are undertaken in small communities or in isolated localities, comparatively few of the workers live within reasonable commuting distance. When employment is high, acceptance of such a job is purely voluntary, and, presumably, few of the workers who go to them have strong ties with their home localities. When employment is only fair, men with family responsibilities have to choose between the prospect of intermittent unemployment at home and of a long, steady job elsewhere. This condition is not unique to construction but is more prominent in that industry than in most manufacturing industries. *(Pages 20-21.)*

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A contractor's total employment requirements at any particular project are likely to vary fairly rapidly, and his need for workers in a particular occupation varies even more rapidly. Peak requirements lasting only a few days, or even only a day or so, are by no means uncommon.

Special trade contractors are able to meet this situation

fairly well by transferring workers from one job to another, since they usually have a number of jobs in some stage of progress at a time. Even they, however, are ordinarily unable to schedule these for continued uniformity of their total employment because their ability to proceed at any job is dependent on the readiness of related work done by the general contractor or other special trade contractors. General contractors have less flexibility in this respect because their business usually consists of a smaller number of individually larger jobs[4], so that lay-offs are more common for their workers.

Hence, employment is on a temporary rather than a permanent basis. It is true that many thousands of journeymen have worked steadily for the same employers for years and that contractors have no more desire than other employers to lay off satisfactory workers unnecessarily. Nevertheless the conditions under which the industry operates have created the general understanding that employment can be terminated at any time.

Since work for any given employer is usually temporary, employer-employee relations are traditionally informal and commonly casual. Building workers tend to regard themselves as members of given trades, rather than as employees of given contractors. The permanent asset is competence in a recognized trade, rather than seniority or other preferential status with a given firm.

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[4] Larger as measured by the value of work performed by the contractor's own employees, or by the hours worked by those employees. In this sense, any particular building is a much larger job for the general contractor who puts up the basic structure than for any of the special trade contractors.

Journeymen are ordinarily hired by the foreman. He selects applicants at the job and often telephones men he knows to offer them work. For some trades in some localities, agreements provide that contractors or foremen shall inform the union office of need for additional workers and shall hire those sent in response, but with the right to dismiss any regarded as unsatisfactory after a brief trial.[5] Hiring through the union office is also done in cases where it is not required by working agreements. The foreman also discharges employees, at any time and for any reason—reduction in force, dissatisfaction with work, or merely personal antagonism. A newly hired worker may be discharged after a few hours while hiring in the same trade is still in progress. He is subject to lay-off at any time, either permanent (as the work for which he was hired approaches completion) or temporary, with instructions to return at a stated time, because of a temporary shortage of material, or to allow other trades to complete work which must be done before he can proceed further with his own work. A carpenter discharged from work on concrete forms because he is too painstaking and therefore too slow for that grade of work, may be hired readily by the same foreman at a later stage of the same job for installing millwork, where his careful workmanship is appropriate. The other side of this arrangement is that a workman is free to quit at any time for any reason—to take a job closer to home, a job likely to continue for several months, a job expected to provide more hours of work weekly because of greater over-

[5] These agreements provide that workers may be hired otherwise, if the union is unable to provide men within a specified period. They are subject to such pertinent legislation as may be in effect from time to time.

time or better protection from weather interruptions, a job in a specialty of his trade which he enjoys particularly, or for any other reason.

There are no formal employment records, in the sense in which these are commonly maintained for factory employment. Workers are hired principally on the basis of apparent ability to do the work on hand; they tell the foreman about the work they have done and, if hired, are kept on the job as long as work is available for which they are satisfactory.

A contractor whose volume of work permits usually tries to retain a semipermanent nucleus of journeymen who, he has found, can do a good job, expanding this nucleus by hiring others as needed and then laying them off when the peak is over.

Along with its undesirable features, this rather loose employment relationship has two very real advantages to journeymen. The first is separation of their own fortunes from those of any single employer. Seniority is not a consideration in either hiring or lay-off.[6] Hence, discontinuance of a firm from death or retirement of the proprietor, or from bankruptcy or voluntary liquidation, from an employment standpoint is merely an incident to its workers, whereas it is a disaster in those industries having irregular employment along with strict seniority. The second advantage is

[6] In a very few areas there have been partial seniority systems for some trades, providing that workers on a particular project shall be laid off in reverse order of their hiring on that project. This is quite different from a company-wide seniority system; the difference in seniority standing between the lowest and the highest man on the list is seldom more than a few months and, frequently, is only a few weeks.

the personal independence in action and attitude of workers whose employment is governed by their own competence along with general business conditions rather than by their standing in a single business firm. *(Pages 22-23.)*

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The next step in promotion as an employee is to general foreman or superintendent. Here the situation differs among trades, but in all cases such a man is a full-time management representative of the contractor and does not work with tools or install materials. Payment is ordinarily on a straight salary basis and is commonly 25 to 50 per cent above full-time hourly earnings for his trade—the amount depending on his responsibilities and the size of the operations.

A general foreman or superintendent for a general contractor is responsible for the entire job. He directs the work of the general contractor's men, ordinarily doing so through the gang foremen, and coordinates the work of the various subcontractors' crews. He has no authority over the subcontractors' foremen and gives them information and comments (his interpretation of drawings affecting their work, the general progress schedule laid out, conformity of their work to his own or to that of other subcontractors, etc.) but not direct orders. Disagreements which cannot be settled directly are referred to the respective contractors. A general foreman of this type is ordinarily a bricklayer or carpenter by trade. A superintendent is commonly a bricklayer or carpenter but on very large jobs is likely to be a civil engineer, an architect, or a man with administrative background.

In the special trades (plumbing, electrical work, painting, etc.) general foremen and superintendents are less common than in general contracting. They are responsible only for the work of their own trades and for its direct relation to other work. These men are employed only by the largest of the special trade contractors. In some cases such a man works on an unusually large job, where he is in charge of all of his employers' gang foremen; in other cases he is in charge of a number of jobs, calling at each daily to review progress, any problems that have risen, expected material and equipment needs, etc.

It is possible for a workman to become a contractor, and many thousands have done so. Sound journeyman knowledge is a great help, but ability to plan work, to foresee needs and problems, to direct others, and to estimate material and time requirements for jobs on which he is preparing bids are much more useful than unusual craftsmanship skill. Annual earnings vary greatly with a number of factors—capital, the current volume of building (which affects both the volume of business available and the profit margin which can be included realistically in bids), ability to plan and direct field work, and business ability. The common belief that contracting is a sure, rapid path to wealth is exaggerated, to say the least. In 1939, 39 per cent of all general building contractors performed work valued at less than $10,000 and more than 32 per cent performed work valued at $10,000 up to $25,000; among special trade contractors, almost 78 per cent performed work valued at less than $10,000, and 14 per cent performed work valued

at $10,000 up to $25,000.[7] Obviously most of these small contractors must have had comparatively modest earnings; probably earnings for many were less than would have been provided by full-time employment as foremen or even as journeymen at their respective trades. *(Pages 24-25.)*

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Many small contractors act as working foreman on their jobs, doing as much as possible of their work (soliciting orders and contracts, preparing bids, keeping books, deciding on orders for materials, etc.) in the evenings. This is a wearing schedule, its advantage being reduction of expenses when the business is small and capital is limited. Its disadvantage is that management duties may receive insufficient careful thought. For small-scale contracting, with perhaps no more than half a dozen employees, management duties are usually considerably less than a full-time job, but considerably more than can be handled successfully on a spare-time basis. The expense of taking sufficient time during regular working hours for at least a part of the planning of operations, careful scheduling of material requirements, negotiations with material dealers and others, etc., is likely to be less than losses resulting from errors and neglect when these are compressed into evenings following full days of hard work. *(Page 26.)*

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Cutting across the entire construction field are the three

[7] 16th Census: Census of Business, vol. IV: Construction: table 5-A, p. 53. Value of work performed means work carried out during the year with their own employees, rather than total contracts received or completed during the year; it excludes the value of those parts of the work sublet to others. Many of the smallest of the contractors might perhaps have been regarded as self-employed workmen.

classes of workers by whom construction is performed: journeymen; tenders and other semiskilled workers; and laborers. While in some respects foremen and apprentices can each be regarded as a separate class, both are grouped with journeymen in most parts of this bulletin because of very great similarities in many important features of their work. Their distinguishing characteristics are stated below for the building trades as a whole rather than separately for the individual trades.

Journeymen

By far the most important class is that of journeymen or skilled workers. These are the men who operate tools and machines and who process and install materials. As already mentioned, they are divided among numerous trades, each having a designated field in the over-all construction operation. The trades differ among themselves in the required skills, knowledge of materials, and knowledge of design or lay out. They are alike, however, in that in each case the standard of competence is ability to perform all types of work within the range of the trade, good working knowledge of all of its materials and how they are used, and understanding of the principles on which the work of the trade is based. Some journeymen are naturally more capable than others, and in most construction trades, as in other occupations, there are difficult or uncommon jobs for which journeymen with unusual dexterity or long experience are preferred.

While the kinds of work differ among the separate trades, most of them require a similar degree of skill. Laying out

the framing members for a dormer window in a roof is quite different from laying out the plumbing system for a house, but they call for the same general kind and degree of ability. Each job requires knowledge of the assembly to be made, knowledge of the materials, and knowledge of what to do as well as how to do it. It is such knowledge, rather than merely facility in the use of tools, that marks a journeyman; skill with tools is necessary but is only part of the all-round ability required.

Foremen in any of the skilled trades are invariably journeymen who have been promoted. Most commonly a foreman is in charge only of the crew for his own trade (usually including any tenders, helpers, or laborers working with the journeymen) but not infrequently he is in charge of all of his employer's workers. Thus, either a carpenter or a bricklayer might be in charge of a general contractor's entire gang at a project where several houses are being built. On very large jobs there are frequently foremen for laborers and for some of the semiskilled occupations, but these men have a smaller range of responsibilities than do the foremen in the skilled trades. On such jobs there are commonly several foremen in the larger trades, each in charge of the members of his trade working at a particular part of the project, and there may also be subforemen ("straw bosses," "pushers"); there is also a general foreman or superintendent responsible for the coordination of all work, who usually delegates direct supervision of the journeymen to the gang foremen.

Foremen are responsible for planning the work in their respective trades, at least broadly if not in detail, and for

seeing that it is carried out correctly and quickly. They call attention to any unusual requirements or situations needing special attention; arrange for delivery of materials as needed; hire, lay off, and discharge workers; represent the contractor in dealings with other contractors or their foremen, the owner, and the architect, interpret the drawings, if these are not entirely clear, or else obtain an interpretation from the contractor or the architect; and keep pay-roll records and records of material deliveries, unless the job is large enough to have a timekeeper. In most localities small jobs are run by "working foremen" who work at their trades along with members of their own crews except when engaged in supervisory or management duties, while on large jobs the foremen do no actual production work. The general contractor's foreman, whether a working foreman in charge of three or four men or a general foreman directing several hundred men through trade foremen and sub-foremen, is responsible for coordination of the work of all contractors on the job but has definite authority over the employees of the general contractor only. *(Pages 35-36.)*

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Any construction work except the simplest uses a wide variety of materials, each with its own characteristics and each requiring appropriate tools and methods of handling. Most of these materials appear in many different types of structures, and the job of putting them in place is essentially the same. Thus brickwork is used in houses and apartment buildings, churches, hospitals, factories, in fact buildings of all types, and also in nonbuilding structures like walls or utility manholes. The operations involved in

the brickwork are essentially the same for all of these structures and for many more; but in any single type of structure, such as a two-story house, the job of building the brick walls and chimney is basically different from the other jobs needing to be done.

Hence, construction operations have long been divided among a number of different trades. Some have been recognized as distinct occupations for thousands of years, while others arose fairly recently when technical developments (electric wiring, elevators, structural steel work, and power-operated construction machinery, etc.) created types of work clearly outside the fields of the older trades. Technical developments have changed the characteristics of most trades, particularly within the last 25 years, but distinct trades continue to be the basis on which construction operations are organized. The increasing complexity of buildings and the increasing range of materials and tools, combine to increase rather than diminish the necessity for division of the exceedingly wide construction field.

The field of each trade is essentially the processing and installation of a given group of related materials for any type of structure, with use of the appropriate tools and equipment. Until about 50 years ago trade distinctions along these lines were comparatively simple, but new materials and methods have made the distinctions much more complicated. Thus, the traditional materials for carpentry were rough lumber, finished lumber and millwork, plus supplementary hardware. To these have been added plywood, rigid insulating board, gypsum board, other building board, nonrigid insulation, "soft" floors (linoleum,

asphalt tile, etc.), cement-asbestos shingles, and many others. Meanwhile metal products have become fairly common for uses where wood had been universal—sash and frames, doors and frames, moulding, movable partitions, floor joists, cabinets, and numerous others. Similar examples could be given for other trades.

Developments of this type have meant some degree of turbulence for construction as a whole, have changed the boundaries between trades, and have brought numerous instances of disagreement regarding the trade by which a new material was to be used. Turbulence has been present when there was no jurisdictional conflict. This is well illustrated by the methods used for fire-resistive protection of structural steel, in building construction. Steel columns and beams were covered with specially shaped tile, laid by bricklayers, for about the first quarter century of fire-resistive steel construction.[8] Then improved knowledge of concrete and improved means for its handling brought a rapid change to covering with poured concrete,[9] which has been standard for about 30 years. Now a quite new method has appeared, enclosure of the steelwork with metal lath to which a new type of plaster is applied by plasterers. This use of plaster for fireproofing is particularly significant as an indication of change, because older types of

[8] Brick, terra cotta, and other masonry materials, which had been used for such fireproofing of cast and wrought iron as was done prior to the development of steel-frame construction, were also used but were superseded by hollow tile.

[9] Although concrete used for fireproofing is quite distinct from reenforced concrete, this change to fireproofing concrete for the steel work was greatly hastened by an accompanying change from flat masonry arches to reenforced concrete for the floors.

plaster were used to some degree for the same purpose about 50 years ago and found to be unsatisfactory. The latest method has the great advantage of a marked saving in weight and seems likely to become a common procedure, if not the standard procedure. Yet the possibility exists that in turn it may be partially or entirely replaced in the future by a still different method. *(Pages 37-38.)*

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APPENDIX B

The pertinent provisions of the National Labor Relations Act, as amended (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 et seq., as amended by the Act of June 23, 1947, Public Law 101, 80th Congress, 1st Session, 29 U. S. C., Supp. 151 et seq.) are as follows:

Sec. 2. When used in this Act—

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"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

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Section 8.

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"(b) It shall be an unfair labor practice for a labor organization or its agents—

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"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is : (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representatives of such employees under the provisions of Section 9: * * *

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"(c) The expressing of any views, arguments, or opinion, or the dissemination thereof, whether in writing, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

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Section 10. "(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affect-

ing commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

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"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the plead-

ings and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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"(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4 (A), (B), or (C) of Section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts

business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law; *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the court shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony; *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D).

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Sec. 13. "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

Sec. 303. "(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other persons;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of of such employees under the provisions of section 9 of the National Labor Relations Act;

"(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the

representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representatives for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Sec. 501. "When used in this Act—

"(1) The term 'industry affecting commerce' means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

"(2) The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

"(3) The terms 'commerce,' 'labor disputes,' 'employer,' 'employee,' 'labor organization,' 'representative,' 'person,' and 'supervisor' shall have the same meaning as when used in the National Labor Relations Act as amended by this Act."

Sec. 102. "No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of enactment of this Act which did not constitute an unfair labor practice prior thereto and the provisions of Section 8 (a) (3) and Sections 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactments, but prior to the effective date of this title, if the per-

formance of such obligation would not have constituted an unfair labor practice under Section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto."